

STATE OF CONNECTICUT  
DEPARTMENT OF PUBLIC UTILITY CONTROL

RE: PETITION OF GEMINI NETWORKS	)	DOCKET NO. 05-02-___
CT, INC. FOR ARBITRATION PURSUANT	)	
TO SECTIONS 252(b) AND 252(i) OF THE	)	
TELECOMMUNICATIONS ACT OF 1996 TO	)	
ESTABLISH AN INTERCONNECTION	)	
AGREEMENT WITH THE SOUTHERN NEW	)	
ENGLAND TELEPHONE COMPANY	)	FEBRUARY 8, 2005

**GEMINI NETWORKS CT, INC. PETITION FOR ARBITRATION**

Gemini Networks CT, Inc. (“Gemini”), through its undersigned counsel, hereby petitions the Connecticut Department of Public Utility Control (“Department”) for arbitration of certain rates, terms, and conditions for interconnection and related arrangements with The Southern New England Telephone Company d/b/a SBC Connecticut (“SBC”) pursuant to Sections 252(b) and 252(i) of the Communications Act of 1934, as amended (the “Petition”).<sup>1</sup>

Under the Act, parties negotiating for interconnection, access to unbundled network elements, or resale of services within a particular state may petition the state commission, in this case the Department, for arbitration of any unresolved issues during the 135<sup>th</sup> to the 160<sup>th</sup> day of such negotiations.<sup>2</sup> Accordingly, Gemini is filing this Petition with the Department to seek relief from the Department in resolving outstanding interconnection issues. Pursuant to the Act,<sup>3</sup> this arbitration is to be concluded not later than nine months after the applicable request for negotiations, which for purposes of this Petition is June 20, 2005, as explained below.

This arbitration concerns what should be a very simple interconnection issue – access to SBC’s abandoned hybrid-fiber coaxial (“HFC”) facilities as ordered by the Department in

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<sup>1</sup> Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151 et seq. (1996)) (“Act”).

<sup>2</sup> 47 U.S.C. § 252(b).

<sup>3</sup> 47 U.S.C. § 252(b)(4)(c).

Docket Nos. 03-01-02 and 03-01-02RE01. Unfortunately, SBC has sought to make Gemini's access so complicated that it is, in fact, as proposed by SBC, completely unworkable. Gemini believes that it is SBC's intention in this regard to provide Gemini with access to portions of the HFC network as ordered by the Department, but to provide Gemini with access in a way that prevents Gemini from making any practical use of the HFC facilities.

Moreover, Gemini believes that SBC has failed to meet its obligation under the law to negotiate in good faith with Gemini. In addition to negotiating for access to the HFC UNE, Gemini attempted to negotiate the standard, non-HFC related appendices with SBC. Gemini provided its comments on the generic 13-state Appendices to SBC as follows:

November 10, 2004 – Physical Collocation; Virtual Collocation

November 11, 2004 – Structures/rights-of-Way

December 6, 2004 – General Terms and Conditions; Network Interconnection Methods; Coordinated Hot Cut

December 8, 2004 – Interconnection Trunking Requirements

December 27, 2004 – OSS and Resale; Emergency Services

January 3, 2005 – Numbering; Revised Interconnection Trunking Requirements

January 7, 2005 – White Pages, Pricing, Recording, Intercarrier Compensation

January 26, 2005 – Number Portability; Operator Services; Directory Assistance; Inward Assistance Operator Services; Direct

January 27, 2005 – Lawful UNEs

However, as of the filing of this Petition, Gemini has not received any response from SBC concerning Gemini's markups or comments on any Appendix other than the HFC UNE drafts. SBC's counsel emailed Gemini's counsel on January 27, 2005 that SBC would provide

responses beginning “next week.” No responses or other communications were forthcoming.

Gemini is not willing to further delay

the filing of its Petition to wait for SBC, especially in light of the tight time schedule for arbitration and the complicated issues to be resolved by the Department.<sup>4</sup> SBC’s failure to respond or provide Gemini with comments on Gemini’s mark-ups of the standard 13-state Appendices has directly resulted in the length of this Petition and the number of issues for which Gemini must seek arbitration. Gemini believes that many of the issues included herein could have been resolved by the parties had SBC responded.

At the outset of this arbitration proceeding, the Department must make one fundamental determination that will impact the remainder of the issues to be resolved with respect to the HFC UNE. Gemini and SBC refer to this fundamental issue as the “Big UNE, Little UNE” issue. More specifically, at the outset of negotiations, Gemini began negotiating for exactly what it petitioned the Department: unbundled access to Tier 3 of the abandoned HFC network, as is, including the nodes, optronics, fiber tail, coaxial cable and any existing power supplies (the “Big UNE”). However, from almost the initial meeting, SBC unilaterally determined that certain portions of the HFC UNE would not be made available to Gemini. SBC has taken the position that only the coaxial cable portion of Tier 3 of the abandoned HFC network will be made available to Gemini and that no access will be provided to the nodes, optronics, fiber tails, or power supplies (the “Little UNE”). Ultimately, the parties determined to “agree to disagree” and attempted to negotiate two separate HFC UNE Appendices, one based on the Big UNE and one

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<sup>4</sup> Gemini is aware that the FCC released its new UNE rules on February 4, 2005 in response to the D.C. Circuits remand. See Order on Remand, CC Docket Nos. 01-338, WC Docket No. 04-313, in the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Feb. 4, 2005. However, Gemini did not fully review the new UNE rules as it did not want to further delay the filing of this Petition. Based on a cursory review of the New UNE rules, Gemini continues to believe that the FCC’s UNE rules do not contemplate the HFC network. Gemini reserves its rights to incorporate additional

based on the Little UNE. Thus, Gemini requests that the Department make an initial determination as to whether or not Gemini is entitled to access to the Big UNE. The arbitration can then proceed based on the issues associated with that determination.

Gemini respectfully seeks the Department's assistance with securing a reasonable, nondiscriminatory, pro-competitive interconnection agreement with SBC for the use of the abandoned HFC network and other standard UNEs, as set forth herein.

## **I INTRODUCTION AND OVERVIEW**

Gemini is a Delaware corporation authorized to do business in the State of Connecticut. Gemini operates broadband network facilities in Connecticut, as authorized by the Department, and holds a certificate of public convenience and necessity ("CPCN") to operate as a CLEC in Connecticut. Gemini seeks arbitration of the outstanding issues raised in this Petition in order that it may proceed with the deployment of voice and other advanced services in accordance with its CPCN.

Gemini is a competitive, facilities-based provider of services that began offering some services to Connecticut customers in December of 2000. On September 1, 1999 the Department authorized Gemini to provide wholesale Internet access to retailers or competitive local exchange carriers.<sup>5</sup> On January 17, 2001, the Department expanded Gemini's authority to provide wholesale facilities-based telecommunications service on a state-wide basis to retail telecommunications providers who offer service to end-users in Connecticut.<sup>6</sup> Gemini later requested to expand its services to provide retail telecommunications services to end-users on

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arguments from the new rules upon a complete review of same. Gemini further believes that the standard replacing the qualifying services standard buttresses Gemini's Agreements.

<sup>5</sup> See Decision, Docket No. 99-03-12, Application of Gemini Networks, Inc. for a Certificate of Public Convenience and Necessity, Sept. 1, 1999.

both a facilities-based and resold basis. The Department granted Gemini's request.<sup>7</sup> Gemini plans to continue expanding its footprint throughout the State of Connecticut. With its full array of service offerings and state-of-the-art network, Gemini can provide a competitive alternative for customers throughout Connecticut. A critical component of providing such services as a facilities-based carrier, however, is a mutually beneficial interconnection agreement with SBC that includes SBC's abandoned HFC network. The Department is well aware of the competitive benefits of providing competitive access to the abandoned HFC network and has already twice ordered SBC to negotiate an appropriate interconnection agreement with Gemini.<sup>8</sup> To establish that agreement, the Act requires SBC to fulfill its obligations under the Act by negotiating in good faith the terms and conditions of the interconnection agreement and to treat Gemini in a nondiscriminatory manner vis a vis itself or other carriers.<sup>9</sup>

A fundamental issue in this arbitration, and one that may prove the demise of competitive access to the HFC network, is SBC's refusal to negotiate access to the whole HFC UNE. SBC's Little UNE is essentially a "poison pill" to Gemini's use of the abandoned HFC network. The Little UNE model as offered provides Gemini with access to the "Coaxial Cable Facility

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<sup>6</sup> Decision, Docket No. 00-10-20, Application of Gemini Networks, Inc. to Expand its Certificate of Public Convenience and Necessity, Jan. 17, 2001.

<sup>7</sup> Decision, Docket No. 01-06-22, Application of Gemini Networks CT, Inc. to Expand its Certificate of Public Convenience and Necessity, Sept. 28, 2001.

<sup>8</sup> See Decision, Docket No. 03-01-02, Petition of Gemini Networks CT, Inc., for a Declaratory Ruling Regarding the Unbundled Network Elements of the Southern New England Telephone Company, Dec. 17, 2003; Decision, Docket No. 03-01-02RE01, Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Concerning the Unbundled Network Elements of the Southern New England Telephone Company – Feasibility Determination, Aug. 2, 2004.

<sup>9</sup> 47 U.S.C. § 251(c), (i). In addition, ILECs are required: (1) to provide interconnection; (2) to make available access to unbundled network elements; (3) to offer retail services for resale at wholesale rates; and (4) to provide for the collocation of facilities. See 47 U.S.C. § 251(c). Furthermore, both Parties, as local exchange carriers, have the duty: (1) not to impose unreasonable conditions on the resale of telecommunications services; (2) to provide number portability; (3) to provide dialing parity; (4) to afford access to rights-of-way; and (5) to establish reciprocal compensation arrangements. See 47 U.S.C. § 251(b).

Subloop,”<sup>10</sup> which is the part of the HFC network located between the node and the drop.

However, SBC has placed so many obstacles in the way that such access is merely theoretical.

The remaining HFC plant has three primary subcomponents. One is the fiber trunk, for which Gemini is requesting a limited “tail” for interconnection purposes. A second is the node, which is located inside a node housing that in turn has an external power supply. The third is the coax itself, the only part included in SBC’s Little UNE, and which ends at the taps. Gemini is not requesting the use of any SBC-installed drop wires.

SBC has offered three options for Gemini to access the Node, none of which are in the context of a UNE, are acceptable or practical. The three options presented are (1) that Gemini can rent the nodes under a commercial agreement, however, SBC has not yet offered; (2) Gemini can buy the nodes at a price, that SBC has not yet disclosed; or (3) Gemini can purchase its own nodes. None of these are consistent with the Department’s decisions to unbundled the HFC network.

SBC characterizes the Node Housing as being a shared collocation space, subject to CRTEE collocation tariffs, wherein the typical nonrecurring cost per node is in the thousands of dollars. Under SBC’s proposal, even if Gemini pays these exorbitant fees for the nodes, Gemini will not gain unescorted access to the nodes; instead, Gemini will be required to bring its own trunk fiber to the Node Housing and pay SBC personnel to attach it to the node, even if Gemini owned the node. This proposed “Solution” can only occur after SBC undertakes costly, time-consuming surveys of the plant behind each requested node, which will dramatically delay availability of the node. Further, this will only occur after SBC undertakes costly, time-consuming development of an operational support system that is not necessary.

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<sup>10</sup> Gemini disputes SBC’s characterization of the HFC facilities as a subloop.

SBC characterizes its trunk fiber as being an instance of “fiber feeder,” requiring it to have continuity from the node to the central office. While dark fiber remains at this time in Section 18 of the SBC Connecticut Access Tariff, it is a discontinued UNE under the *Triennial Review Order*, and Gemini expects SBC to request that it be removed from that tariff. Thus its availability, as an alternative to Gemini’s own trunk feeder, is probably ephemeral. At the same time, SBC is not permitting Gemini to overlash its own fiber in the HFC gain, even where there is nothing but HFC plant using the gain.

Even if the Node is made available on reasonable terms, SBC will not allow Gemini personnel or contractors to touch the terminating taps. Therefore, Gemini will have to install its drop wires on the pole, possibly in a separate gain, and wait at least one day for SBC personnel to screw the plug into the jack. The cost of this additional truck roll, on a house-by-house basis, will be prohibitive. Gemini, in essence, will then be ordering service to individual homes from SBC, providing SBC with a list of Gemini’s customers.

SBC’s definition of the coaxial UNE (Little UNE) as ending at the first gap, with no repairs either performed by SBC or authorized for Gemini to perform, dramatically limits its usefulness. Under SBC’s proposal, none of the plant can be upgraded to meet current HFC standards. Much of the plant thus becomes “space junk,” taking up scarce pole space and preventing Gemini from replacing it, while performing no useful function.

SBC also demands that every single Gemini customer be taking a recognized “telecommunications service.” Gemini intends to offer a broad range of services, including voice, but SBC’s demand in effect bundles Gemini’s voice service with its data offerings and/or any video offerings. This puts Gemini at a disadvantage compared with, for example, DSL providers making use of unbundled loops, whose services do not need to be bundled with voice.

Thus, it is theoretically possible for Gemini to “thread the needle”, leasing SBC putative fiber feeders to a putative “remote terminal” hosting a node in shared space, with uncertain provision of power, to a possibly-working but unmaintained coaxial facility, attachment of subscribers to which is costly and slow.

Although Gemini attempted to negotiate the right to provide its own optronics and replace other portions of the abandoned HFC network that SBC has stated are not being offered, in a good faith attempt to make SBC’s offer workable, Gemini’s requests have been rebuffed. Thus, SBC’s Little UNE would provide Gemini with small portions of coaxial cable, not powered, not connected to optronics, and provide Gemini with no right to power those portions, connect them to other coaxial cable, connect them to optronics or use them in any constructive way. In essence, SBC has offered a paper deal that has no practical application, a clearly anti-competitive result.

SBC’s position during negotiations with Gemini is in open defiance of the Department’s orders that Gemini be provided with access to Tier 3 of the abandoned HFC network so that Gemini may utilize that network to provide competitive services to Connecticut consumers. Gemini has sought repeatedly throughout the prior dockets, appeals, the FCC proceeding, the Connecticut District Court proceeding and interconnection negotiations to act in good faith and minimize the resources being wasted on these proceedings. In contrast, SBC’s behavior reinforces its reputation for forcing competitors to expend substantial and unnecessary resources to secure reasonable interconnection arrangements despite the Act’s intent and this Department’s orders, to provide an administratively simple and hassle-free method for competitors to secure interconnection agreements. As a result, Gemini is compelled to seek the Department’s assistance to resolve this matter in a fair and equitable manner.



To date, the Parties have been unable to reach a negotiated agreement as contemplated by Section 252 of the Act, due in large part to SBC's unwillingness to fulfill its responsibilities under the Act, the FCC's rules and the Department's orders. Section 252(b) permits either party to the negotiations to petition a State commission to "arbitrate any open issues" unresolved by voluntary negotiations.<sup>11</sup> As Gemini and SBC have not reached a voluntarily negotiated agreement, Gemini hereby files this Petition.

## **II. OUTLINE OF THE PETITION**

In accordance with Sections 252(b)(2)(A) and 252(b)(2)(B) of the Act, Gemini provides all relevant documentation concerning - (i) the unresolved issues; (ii) the position of each of the parties with respect to those issues, where available;<sup>12</sup> and (iii) any other issue discussed and resolved by the parties.<sup>13</sup> All relevant documents are affixed as Exhibits to this Petition.

## **III. UNRESOLVED ISSUES LIST**

The issues that remain open and require resolution in this arbitration are listed below. The issue descriptions are merely for convenience of reference only. Resolution of the fundamental "Big UNE, Little UNE" issue listed in category I will determine the need for the Department to review the issues listed in categories I.A or I.B. If the Department determines that

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<sup>11</sup> 47 U.S.C. § 252(b)(1). Pursuant to that provision, either party may petition the State commission for arbitration during the period from the 135th day to the 160th day (inclusive) after the date on which the incumbent carrier received the request for negotiation. The start date of negotiations is September 20, 2004. Thus, the first day Gemini was able to file for arbitration was February 1, 2005 and the arbitration window closes February 26, 2005. The date by which the Department should render a decision is June 20, 2005.

<sup>12</sup> Gemini is unaware of SBC's position on any issue other than the HFC Appendix issues, as SBC failed to respond to any of Gemini's markups or concerns on any other issue prior to the date of filing of this Petition. See Exhibit A attached hereto for email correspondence corroborating the dates of delivery of Gemini's markups to SBC and Gemini's requests for responses to its markups. Any responses received from SBC are also included.

<sup>13</sup> 47 U.S.C. § 252(b)(2)(A).

all of Tier 3 of the abandoned HFC plant should be unbundled, the Department need not review the issues in Section VI.B. If the Department accepts SBC's Little UNE construct, the Department need not review Section VI.A.

The Exhibits attached represent the most current drafts exchanged between the parties, which for all but the Big UNE and Little UNE Appendices are Gemini's first mark-up of SBC's 13-state general appendices.

I. Big UNE (HFC) or Little UNE (coaxial cable only)

**Appendix Big UNE, including fiber tails, nodes, optronics, power supplies**

1.	Sections 1.1; 1.2; 1.3	Legal Language
2.	Section 1.4	Third Party Access Language
3.	Section 1.5	Testing
4.	Section 1.6.6	Node Housing vs. RT
5.	Section 1.6.17	Access to Power Ports and Power Inseters
6.	Section 1.6.24	Uniqueness of the HFC Network
7.	Section 2.1	Permissible Services
8.	Section 2.8	Applicable Standards
9.	Section 2.9	Qualifying Services
10.	Section 2.10	OSS
11.	Sections 3.2; 3.4	Repair and Replacement
12.	Section 3.5.1.1	Bridging Gaps
13.	Sections 3.5.1.2; 3.5.2.4; 3.5.3.3	Stipulation
14.	Section 3.5.1.3	Repair and Replacement by Gemini
15.	Sections 3.5.2; 3.6.2; 3.6.3	Replacement of Node Housing and Optronics
16.	Sections 3.5; 3.6	Fiber Tail
17.	Sections 3.5; 4.11.1; 4.12.3; 5.1	Connection to Drop Wires
18.	Section 3.7	Place of Interconnection
19.	Section 3.8.1.1.1	Pilot Carrier and RF Levels
20.	Sections 3.6.4.1; 3.8.4.2	Maintenance and Repair
21.	Section 3.8.5	Performance Specifications
22.	Sections 3.9.2; 3.9.3	Components to be Repaired
23.	Sections 3.9.5 through 3.9.11; 4.3	Collocation
24.	Section 3.10	Overlashing

### **Appendix Big UNE continued**

25.	Section 6	Use of Power Supplies
26.	Section 7	Access to Gain
27.	Section 8	Inventory
28.	Section 9	Ordering
29.	Section 10	Activation
30.	Section 16	Commingling
31.	Section 17	Reservation of Rights

### **Appendix Little UNE; coaxial cable only**

1.	Sections 1.1; 1.2; 1.3	Legal Language
2.	Section 1.4	Third Party Access Language
3.	Section 1.5	Testing
4.	Section 1.6.7	Node Housing vs. RT
5.	Sections 2.1; 2.2	Services
6.	Sections 2.5; 12.1; 12.2	Use of Contractors
7.	Section 2.8.1	Applicable Standards
8.	Section 2.9	Qualifying Services
9.	Section 2.10	OSS
10.	Section 2.12	Tariffed Services
11.	Sections 3.2; 3.4	Repair and Replacement
12.	Section 3.4.2	Bridging Gaps
13.	Sections 3.5.1.2; 3.5.2.4; 3.5.3.3	Stipulation
14.	Section 3.5.1	Access to Optronics
15.	Sections 3.5.1.1; 3.5.1.2	CCF RT
16.	Section 3.5.3; 4.11.1; 4.12.3; 5.1	Connection to Drop Wires
17.	Section 3.6; 3.8.2	Maintenance and Repair Costs
18.	Sections 3.7.1.2; 7.1	Power Supplies
19.	Section 3.7.2	Terminating Tap Ports
20.	Section 3.7.2.2.1	Reverse Path Band
21.	Section 3.7.4.3	Vendor Meets
22.	Section 3.7.5	System Performance
23.	Section 3.9	Overlapping
24.	Section 4.1	Collocation
25.	Section 4.6	Rights-of-Way
26.	Sections 4.3; 4.8	Time Frames
27.	Section 6.1	Power Supplies
28.	Section 8.1.1	Defective Components
29.	Section 8	Inventory
30.	Section 9	Ordering
31.	Section 10	Activation
32.	Section 12.3	Service Interruptions
33.	Section 12.4	Mutual Non-Impairment

## **Appendix Little UNE continued**

34.	Section 12.8	Payment for Trouble Calls
35.	Section 16	Commingling
36.	Section 17	Reservation of Rights

## **13-State Language**

## **Appendix General Terms and Conditions**

1.	Section 1.1.32	Declassification
2.	Sections 1.1.63; 2.11.3; 21.1; 22.1	Definition of Lawful
3.	Section 2.8.1	Severability
4.	Section 2.10	Non-Voluntary Provisions
5.	Section 4.1	Provisioning Date
6.	Sections 4.8.1.1; 4.8.1.2; 4.8.2; 4.8.3.2	Assignment
7.	Section 4.12	OSS
8.	Sections 8.4; 8.5; 8.6; 8.7; 9.3.3; 9.3.4; 10.4.1	Escrow
9.	Sections 9.2; 10.4.1	Termination of Service
10.	Sections 10.1.2; 10.4.1	Disputed Bills
11.	Sections 10.7.1; 22.1	Arbitration Situs
12.	Sections 13.4; 13.5; 13.7; 13.8	Damages Limitation
13.	Section 14.5.3	Indemnification
14.	Section 14.6	Subrogation
15.	Sections 17.1.4; 17.1.5.4	Email Notices
16.	Section 20.2.7	Notice of Intent to Disclose
17.	Section 21.1	Intervening Law
18.	Section 33.2	Texas Taxes
19.	Section 38.4	Service to End-Users
20.	Section 42.1	Future UNEs
21.	Section 43.1	True-Ups
22.	Section 44.6.1.2	911 for Data Providers
23.	Section 44.6.10	SBC Access to Gemini Network

## **Appendix ITR (Interconnection Trunking Requirements )**

1.	Sections 2.6; 3.4; 4.4	Local Trunking
2.	Sections 4.2; 4.3; 4.4; 5.3.2.1	Trunking to All Tandems
3.	Section 12.1	VoIP vs. Switched Access
4.	Section 12.1(ii)	FX Traffic
5.	Section 12.2	Third Parties

## **Appendix Intercarrier Compensation**

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|----|-------------------------------|---|
| 1. | Section 3.3<br>Access         | ISP Bound Calls vs. Switched            |
| 2. | Section 5.4                   | Tandem Compensation                     |
| 3. | Sections 6.3; 6.4; 6.5; 6.5.2 | Growth Caps and New Market Restrictions |

## **Appendix Physical Collocation**

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|-----|--|--------------------------------|
| 1.  | Sections 1.3; 9.1                      | Commercial Agreements          |
| 2.  | Section 1.4                            | Tariffed Services              |
| 3.  | Sections 2; 8.1                        | Node Housing                   |
| 4.  | Sections 5.8.1.1.4; 5.8.1.1.5          | Negligence and Subrogation     |
| 5.  | Section 6.1.1.6                        | ICDF Collocation               |
| 6.  | Section 6.4.4                          | Termination Penalties          |
| 7.  | Sections 6.6.2; 6.6.3;<br>6.6.4; 6.6.9 | Escrow                         |
| 8.  | Sections 9.1.1; 9.1.2;<br>9.1.4; 9.3   | Limitation of Services         |
| 9.  | Section 9.2.1                          | Liability                      |
| 10. | Section 11.1                           | Eviction                       |
| 11. | Section 12.2                           | Reciprocity of Indemnification |
| 12. | Section 19.2.8.1                       | 21 Day Lock Out                |
| 13. | Section 19.2.17.1.2                    | Travel                         |

## **Appendix Virtual Collocation**

- |    |                                       |                                    |
|----|---------------------------------------|------------------------------------|
| 1. | Section 1.1                           | Commercial Agreements              |
| 2. | Section 1.2                           | Tariffed Services                  |
| 3. | Sections 1.3.2; 16.1; 16.2            | Security Escort                    |
| 4. | Sections 1.8; 1.10;<br>1.12.1; 1.12.2 | Limitation of Services             |
| 5. | Section 2.14                          | Definition of Technically Feasible |
| 6. | Sections 11; 13.8; 14.1.2             | Reciprocity of Indemnification     |
| 7. | Section 12.5.3.1                      | Power Charges                      |
| 8. | Section 13.4                          | Security Escort                    |
| 9. | Section 14.2.4                        | Negligence and Subrogation         |

## **Appendix NIM (Network Interconnection Methods)**

- |    |                     |                             |
|----|---------------------|-----------------------------|
| 1. | Sections 1.26; 1.28 | Point of Interconnection    |
| 2. | Section 2.1         | Local Trunks to all Tandems |
| 3. | Section 2.7         | SBC's Originating Traffic   |
| 4. | Section 5.1         | Entrance Facilities         |

## **Appendix Coordinated Hot Cut (CHC)**

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|----|-------------|-----------------|
| 1. | Section 2.5 | DPUC CHC Ruling |
|----|-------------|-----------------|

## **Appendix Numbering**

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|----|-------------|------------|
| 1. | Section 2.3 | FX Numbers |
|----|-------------|------------|

## **Appendix for Access to SBC Communication Inc.'s Structure (Poles, Conduits and Rights of Way)**

- |     |                                |   |
|-----|--------------------------------|---|
| 24. | Section 2.13                   | Definition of Rights-of-Way                       |
| 2.  | Sections 4.4; 4.5              | Elective Termination                              |
| 3.  | Section 4.6                    | Refund of Advance Payments                        |
| 4.  | Section 5.6                    | Prior Agreements                                  |
| 5.  | Section 6.1                    | Warranties  |
| 6.  | Section 8.9.1                  | Taxes   |
| 7.  | Sections 10.1; 10.2            | Contractors' Insurance                            |
| 8.  | Sections 14.3.1;<br>14.6; 21.2 | Access to Outside Plant Records                   |
| 9.  | Sections 16.3.2; 26.1          | Compensation for SBC Oversight<br>and Inspections |
| 10. | Section 17.5                   | Expunging Confidential Information                |
| 11. | Section 20.5                   | Existing Nonconformance and<br>Rearrangement      |
| 12. | Section 20.7                   | Payment for Existing Capacity                     |
| 13. | Section 27.2                   | Notice  |
| 14. | Section 28.3                   | Removal Time Period                               |
| 15. | Section 29.2                   | Changes in Rates                                  |

## **Appendix Pricing**

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|----|-------------|-------------------|
| 1. | Section 1.7 | Pick and Choose   |
| 2. | Section 1.9 | Bona Fide Request |

## **Appendix 911**

- |    |               |             |
|----|---------------|-------------|
| 1. | Section 4.1.1 | 911 Traffic |
|----|---------------|-------------|

## **Appendix OSS – Resale and Lawful UNEs**

- |    |  |                      |
|----|--|----------------------|
| 1. | Section 2.1                            | Definition of Lawful |
| 2. | Sections 2.1.2; 2.1.4;<br>2.5.1; 2.5.2 | Declassification     |
| 3. | Section 2.3                            | Commingling          |
| 4. | Sections 3.1; 4.5.1; 5.4               | OSS                  |

**Appendix OSS continued**

5.       Section 6.1                   Maintenance and Repair

**Appendix DA (Directory Assistance Service) ; Appendix INW (Inward Operator Services); Appendix OS (Operator Services)**

25.      Various                   Early Termination Penalties

**Appendix Lawful UNEs**

26.      Entire Appendix           Omit Appendix

**IV.   RESOLVED ISSUES LIST<sup>14</sup>**

The Parties have reached agreement on some issues, predominantly where Gemini is willing to accept SBC's generic terms. The issues the parties have resolved are as follows:

**Appendix Number Portability**

1. In its entirety

**Appendix Recording**

1. In its entirety

**Appendix White Pages**

1. In its entirety

**Appendix General Terms and Conditions**

1. Sections 1.1.1 through 1.1.12
2. Sections 1.1.14 through 1.1.23
3. Sections 1.1.25 through 1.1.31
4. Sections 1.1.33 through 1.1.62
5. Sections 1.1.64 through 1.1.67
6. Sections 1.1.69 through 1.1.88
7. Sections 1.1.90 through 1.1.95
8. Sections 1.1.97 through 1.1.142
9. Sections 2.1 through 2.5.2
10. Sections 2.6 through 2.9.1
11. Sections 2.12.1 through 2.12.1.2

<sup>14</sup> Gemini notes that it continues to object to the inclusion of SBC's 13-state language in all of these sections, although these listed sections have been substantively resolved.

## **Appendix General Terms and Conditions continued**

12. Sections 2.13.1 through 3.1
13. Sections 4.2 through 4.7
14. Section 4.8.3.1
15. Sections 4.8.4.2 through 4.9
16. Sections 4.10 through 4.11
17. Section 4.13
18. Section 5.1 through 5.5.4
19. Sections 5.7 through 6.3
20. Sections 6.4.1 through 7.1
21. Sections 7.10 through 8.1
22. Section 8.1.3
23. Section 8.2
24. Section 8.3.2
25. Section 8.7 through 8.7.1
26. Sections 8.8.1 through 8.9
27. Section 8.10.3
28. Sections 8.10.5 through 8.12
29. Sections 9.3 through 9.3.2
30. Section 9.4
31. Sections 9.8 through 10.1.1
32. Sections 10.2 through 10.4
33. Sections 10.4.2 through 10.4.5
34. Sections 10.6 through 10.7
35. Sections 11.2.1 through 13.3
36. Section 13.6
37. Sections 14.1 through 14.2
38. Sections 14.4 through 14.5.1.2
39. Sections 14.5.1.4 through 14.5.2
40. Sections 14.7 through 14.8.3
41. Sections 14.8.5 through 17.1.3
42. Sections 17.1.5 through 17.1.5.3
43. Sections 17.1.6 through 17.5
44. Sections 18.1 through 20.2.1
45. Sections 20.2.3 through 20.2.6
46. Section 23.1
47. Sections 24.2.1 through 25.3
48. Sections 26.2 through 27.2
49. Sections 30.1 through 33.1
50. Sections 33.4 through 35.5
51. Sections 36.1 through 38.3
52. Section 39.1
53. Sections 40.1 through 41.1
54. Sections 42.2 through 43.1
55. Sections 43.2 through 44.3.1



## **Appendix General Terms and Conditions continued**

- 56. Sections 44.4.1 through 44.6.1.1
- 57. Section 44.6.3
- 58. Sections 44.6.5 through 44.6.9.1
- 59. Sections 45.2 through 46.1
- 60. Section 47.2.1

## **Appendix ITR (Interconnection Trunking Requirements)**

- 1. Sections 1.1 through 2.5
- 2. Sections 2.7 through 3.3
- 3. Section 4.1
- 4. Sections 4.5.1 through 4.5.1.2
- 5. Section 5.1
- 6. Section 5.3
- 7. Sections 5.3.2 through 5.6.3
- 8. Sections 5.7.5 through 8.3.2.1.4
- 9. Sections 8.4 through 11.1

## **Appendix Intercarrier Compensation**

- 1. Sections 1.1 through 3.1
- 2. Sections 3.4 through 3.6
- 3. Section 4.3
- 4. Sections 5.1 through 5.3.1
- 5. Sections 6.2.2 through 6.2.3
- 6. Sections 7.2 through 7.3
- 7. Sections 11.1 through 13.1
- 8. Sections 15.1 through 15.4
- 9. Section 19.1

## **Appendix Physical Collocation**

- 1. Sections 2.1 through 2.3
- 2. Sections 2.3.2 through 2.5
- 3. Sections 2.7 through 2.11
- 4. Sections 2.13 through 2.15
- 5. Sections 3.1 through 3.2.2
- 6. Sections 4.1 through 4.6.1
- 7. Sections 5.2.1 through 5.8.1.1.3
- 8. Sections 5.8.1.1.6 through 6.1.1.5.1
- 9. Sections 6.1.1.5.3 through 6.1.1.5.4
- 10. Sections 6.1.1.7 through 6.1.4.2
- 11. Sections 6.1.4.3 through 6.1.6.2
- 12. Sections 6.1.7 through 6.1.7.2

## **Appendix Physical Collocation continued**

13. Sections 6.1.8 through 6.2.1.1
14. Sections 6.2.1.3 through 6.2.1.5
15. Sections 6.2.2 through 6.2.2.2
16. Sections 6.3.1 through 6.3.3
17. Section 6.6.1
18. Sections 6.6.6.1 through 6.6.8.1
19. Sections 6.6.10 through 6.6.11.1
20. Sections 6.8 through 7.2.2
21. Sections 8.1 through 8.2
22. Section 9.1.3
23. Sections 9.1.5 through 9.1.10
24. Sections 9.2.2 through 9.2.3.1
25. Sections 9.3.2 through 10.1.2
26. Sections 10.1.4 through 10.2.1
27. Sections 11.2 through 12.1
28. Section 12.3
29. Sections 13.2 through 15.7
30. Sections 16.1 through 19.2.7.1
31. Sections 19.2.9.1 through 19.2.17.1.1
32. Sections 19.2.18 through 21.4.10.1.5.1

## **Appendix Virtual Collocation**

1. Section 1.6
2. Section 1.9
3. Section 1.10.1
4. Section 1.10.4
5. Sections 1.10.7 through 1.10.10
6. Sections 1.10.12 through 1.11
7. Sections 1.12.3 through 2.3.3
8. Section 2.5
9. Sections 2.7 through 2.10
10. Sections 2.12 through 2.13
11. Section 3.2
12. Sections 4.1.1 through 6.2.5
13. Sections 6.3 through 6.3.2
14. Sections 6.3.4 through 6.4.1
15. Sections 6.4.1.2 through 6.5.2
16. Sections 7.2 through 8.1
17. Section 10.1
18. Section 12.2
19. Sections 12.4 through 12.4.4.1
20. Section 12.4.5.3
21. Section 12.4.6.2

## **Appendix Virtual Collocation continued**

22. Sections 12.4.8 through 12.4.8.3.1
23. Section 12.4.15.1
24. Sections 12.4.16.3 through 12.4.16.3.3
25. Section 12.4.17.1.2
26. Sections 12.4.17.2.3 through 12.4.19.1
27. Sections 12.5.1.1 through 12.5.11.1
28. Section 13.3
29. Sections 13.5 through 13.7
30. Sections 14.1.3 through 14.2.3
31. Sections 14.2.5 through 16.1
32. Sections 16.3.1 through 17.4.8.5.1.1

## **Appendix NIM (Network Interconnection Methods)**

1. Sections 1.1 through 1.25.1
2. Section 1.27
3. Section 2.2
4. Sections 2.4 through 2.6
5. Sections 2.8 through 3.2.1
6. Sections 3.4 through 4.5
7. Sections 5.1.1 through 7.1

## **Appendix Coordinated Hot Cut**

1. Sections 1.1 through 2.4
2. Sections 3.1 through 4.1

## **Appendix Numbering**

1. Sections 1.1 through 2.2
2. Sections 2.4 through 2.8.1

## **Appendix for Access to SBC Communication Inc.'s Structure (Poles, Conduits and Rights of Ways)**

1. Sections 1.1.1 through 3.3
2. Sections 4.2 through 4.3
3. Sections 5.1 through 5.5
4. Sections 5.7 through 5.8
5. Sections 5.10 through 5.11
6. Sections 7.1 through 8.9
7. Sections 8.9.2 through 9.1
8. Section 9.3
9. Sections 10.1.1 through 10.1.3

## **Structure Appendix continued**

10. Sections 10.3 through 11.5
11. Sections 12.2 through 14.3
12. Sections 14.3.2 through 14.5.3
13. Sections 15.1 through 15.3
14. Sections 16.2 through 16.2.3
15. Sections 16.2.5 through 16.3.1
16. Sections 17.2 through 17.4
17. Sections 18.1 through 19.1
18. Section 19.2.4
19. Sections 19.2.6 through 20.4
20. Sections 20.6
21. Section 20.8
22. Sections 20.10 through 21.1
23. Sections 22.1 through 23.2
24. Sections 24.2 through 25.5.2
25. Sections 26.2 through 27.1
26. Section 27.3
27. Sections 27.5 through 28.2
28. Sections 28.4 through 29.1
29. Sections 30.1 through 32.1

## **Appendix Pricing**

1. Sections 1.1. through 1.6.5
2. Sections 1.10 through 2.1

## **Appendix 911**

1. Sections 1.1 through 3.4.6
2. Sections 4.1.2 through 4.2.2
3. Sections 4.2.5 through 4.4.1
4. Sections 6.1 through 7.4
5. Sections 8.1 through 11.1

## **Appendix OSS – Resale & Lawful UNEs**

1. Sections 1.1 through 1.28
2. Section 2.1.3
3. Section 2.2
4. Sections 2.4
5. Sections 3.2.1 through 3.3.1
6. Section 3.3.3
7. Sections 3.6 through 3.6.2
8. Sections 3.9 through 4.2.2

### **Appendix OSS continued**

9. Sections 4.2.4 through 4.4.1.1
10. Section 4.5.2
11. Section 5.2.6 through 5.3.3.4
12. Sections 7.2 through 7.2.1
13. Sections 7.2.6 through 7.2.7
14. Sections 7.3 through 7.3.1
15. Sections 7.3.3 through 7.3.4
16. Sections 9.2 through 14.3

### **Appendix DA**

1. Sections 1.1 through 11.1
2. Section 12.1

### **Appendix INW**

1. Sections 1.1 through 9.1
2. Section 9.3

### **Appendix OS**

1. Sections 1.1 through 3.1.1.1
2. Sections 3.2 through 3.2.1
3. Sections 3.2.3 through 4.1.1.5
4. Sections 4.1.1.5.4 through 5.1
5. Sections 7.1 through 13.1
6. Section 14.1

## **V. FACTUAL BACKGROUND**

Nearly three years ago, in June 2002, Gemini made a request in writing to SBC for negotiation of an interconnection agreement to provide access to SBC's abandoned HFC network. After exchange of emails and a couple of face-to-face negotiating sessions, in September 2002, SBC unilaterally declared that the HFC network was not subject to unbundling and walked away from the negotiating table.

After reviewing all of its options, on January 2, 2003, Gemini filed a petition for declaratory ruling with the Department requesting that the Department declare that Tier 3 of the

abandoned HFC network was subject to unbundling and order SBC to negotiate an appropriate interconnection agreement with Gemini. Subsequently, on December 17, 2003, the Department ruled that the HFC network is subject to unbundling and ordered SBC to negotiate an interconnection agreement with Gemini for access to the abandoned HFC network. SBC appealed the Department's decision ordering it to provide unbundled access to the abandoned HFC network on January 29, 2004.<sup>15</sup> SBC sought in its appeal, but failed to obtain a stay of the Department's order to negotiate an interconnection agreement with Gemini. Gemini thus drafted a proposal for access to the abandoned HFC network and sent it to SBC to commence negotiations. The parties exchanged two drafts of documents concerning access to the abandoned HFC network, when, on April 1, 2004, the Superior Court remanded the matter to the Department for a finding on technical feasibility and stayed the parties' interconnection negotiations.

On April 14, 2004, the Department reopened the docket to consider the issue of technical feasibility.<sup>16</sup> After hearings and briefs, the Department again ruled that the abandoned HFC network is subject to unbundling and ordered SBC to negotiate an interconnection agreement with Gemini for access to the abandoned HFC network.<sup>17</sup> Gemini contacted SBC after issuance of this decision to resume negotiations. After considerable back and forth between the parties concerning whether or not SBC would seek a stay (SBC informed Gemini that an appeal was a certainty), and additional back and forth between the parties considering whether the negotiating period needed to be restarted or merely resumed where the parties had left off in April, Gemini

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<sup>15</sup> See generally, SNET v. DPUC, et al., CV-04-0525443-S.

<sup>16</sup> See Decision, Docket No. 03-01-02, Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding the Unbundled Network Elements of the Southern New England Telephone Company, Apr. 14, 2004.

<sup>17</sup> Decision, Docket No. 03-01-02RE01, Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding the Unbundled Network Elements of the Southern New England Telephone Company, Aug. 25, 2004.

agreed to restart the negotiating process in an effort to get the process moving.<sup>18</sup> The parties held their first negotiating session on October 4, 2004.

Despite numerous face-to-face negotiating sessions, emails and telephone calls between counsel, Gemini and SBC were unable to agree on a fundamental construct for the HFC UNE Appendix. Both parties agreed that the HFC UNE Appendix would drive many of the other appendices that needed to be negotiated. Gemini maintains that the HFC UNE contemplated by Gemini and implicit in the Department's orders is an end-to-end UNE comprised of all portions of Tier 3 of the remaining, but abandoned HFC plant, in as-is condition (the "Big UNE"). SBC, however, maintains that the HFC UNE is not, in fact, an HFC UNE. Rather, SBC maintains that the UNE is a coaxial cable facility only and does not include existing, abandoned portions of the plant including the node housings, optronics, power supplies and fiber tails (the "Little UNE"). Gemini maintains that the Little UNE proposed by SBC is impractical, especially with the restrictions SBC is seeking to place on Gemini concerning Gemini's ability to place new node housings, optronics, power supplies, and fiber and connect those components to the existing coaxial cable. Further, Gemini believes that SBC's position is inconsistent with the Department's orders.

Despite this fundamental disagreement, Gemini proposed that the parties "agree to disagree" and negotiate two appendices for the UNE comprised of portions of the abandoned HFC network. One appendix would be negotiated based on Gemini's proposal of an end-to-end UNE comprised of all remaining portions of the abandoned Tier 3 of the HFC plant, in as-is condition. A second Appendix would be negotiated based on SBC's proposal of a coaxial cable only UNE. The parties met several times and exchanged comments on each other's proposals.

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<sup>18</sup> See Exhibit B for correspondence between the parties concerning the negotiation start date.

Despite proceeding on these two simultaneous tracks, the parties were unable to reach agreement on the provisions of either HFC UNE Appendix.

Gemini respectfully requests that the Department first make a determination as to whether the Department's intent in Docket Nos. 03-01-02 and 03-01-02RE01 was for Gemini to obtain access to all of the remaining abandoned Tier 3 HFC plant, or only to the coaxial cable portions.

## **VI. UNRESOLVED ISSUES**

### **A. Big UNE vs. Little UNE**

Prior to making any determinations on the specific issues raised in this Petition, the parties respectfully request that the Department make a fundamental determination as to the definition of the UNE that the Department ordered SBC to allow Gemini to access in Docket Nos. 03-01-02 and 03-01-02RE01.

#### **1. Issue Presented – Portions of Network Available**

Whether, in ordering SBC to allow competitive access to the abandoned portions of Tier 3 of SBC's abandoned HFC network, the Department intended that Gemini be entitled to access all remaining portions of Tier 3 of the abandoned HFC network, or only the coaxial cable.

#### **Gemini's Position**

On January 2, 2003, Gemini filed its petition for declaratory ruling with the Department, requesting that the Department "declare that certain hybrid fiber coax ("HFC") facilities owned by the Southern New England Telephone Company ("SNET") and formerly leased to SNET Personal Vision, Inc. ("SPV") constitute unbundled network elements ("UNEs") and as such must be tariffed and offered on an element by element basis for lease to Gemini at total service



long run incremental cost (“TSLRIC”) pricing.”<sup>19</sup> Based on claims by SBC that SBC did not know what elements of the abandoned HFC network Gemini was seeking, the Department ordered Gemini to identify with specificity those elements it desired.

On February 18, 2003 in Docket No. 03-01-02, Gemini filed its response to the Department’s directive that Gemini identify the network elements that it sought to have unbundled.<sup>20</sup> In its filing, Gemini stated that it “is seeking access to all of the listed elements that actually exist in whatever condition they exist.” Gemini’s list included:

1. SBC fiber optic facilities, which includes distribution fiber originally used for the normal operation of the HFC facilities<sup>21</sup>

2. Coaxial distribution facilities, which includes distribution electronics, passive devices and power supplies

a. Distribution electronics

i. Optical nodes

ii. amplifiers

iii. bridgers

iv. line extenders

v. all existing plug-ins and accessories contained within the distribution electronics

b. Passive devices

i. taps

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<sup>19</sup> Gemini Petition Docket No. 03-01-02, Jan. 2, 2003 at 1.

<sup>20</sup> See Exhibit C attached hereto. Gemini initially filed its response under seal, as it was subject to a nondisclosure agreement with SBC. Gemini indicated that it did not take a position on the confidentiality of the list, and left it up to SBC to request a protective order. SBC never requested a protective order and Gemini’s counsel was informed by SBC’s counsel that it did not consider the list to be confidential.

<sup>21</sup> Gemini noted that it was not seeking interconnection or transport fiber from SBC, but only that small portion of the fiber beyond the splice enclosure back to the tap, in order that Gemini could appropriately interconnect with the HFC facilities.

- ii. splitters/directional couplers
  - iii. power inserters
  - iv. in-line equalizers
- c. coaxial facilities
  - i. coaxial cable
  - ii. coaxial connectors/splices
  - iii. heat shrink/weatherproofing
- d. support structures
  - i. strand
  - ii. lashing wire
  - iii. hardware
- e. powering components
  - i. existing power supply attachments
  - ii. power supplies
  - iii. batteries
- f. coaxial subscriber drops<sup>22</sup>
  - i. existing drops that are currently not in use which are connected to the ISNET plant
- g. legal gain attachment for all listed items

In its Decision, the Department stated

In the opinion of the Department, unbundling of the Telco's HFC network is consistent with the Telcom Act because it accomplishes what that act intended to do, afford Gemini access to UNEs that it does not already possess in order to

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<sup>22</sup> Subsequently, during hearings in the reopened docket, Gemini testified that it would not use SBC's existing drops.

provide service offerings in direct competition with the incumbent LEC (i.e., the Telco).<sup>23</sup>

The Department also specifically noted that Gemini's request encompassed more than just the coaxial cable. "Relative to the Petition, Gemini has requested unbundled access to the coaxial portion of the loop and the electronics related to that plant."<sup>24</sup> "Gemini has expressed a need for certain facilities that offer the functions and features that can be provided from the HFC network. Only the Telco's HFC network facilities (together with its requirement that it make those facilities available to its competitors) can satisfy those service needs."<sup>25</sup> Throughout the Department's decision in the initial docket, as well as in the reopened docket, the Department consistently required SBC to unbundle the HFC network. The Department defined the HFC network as follows: "[b]y way of contrast, the Telco's HFC network is comprised of fiber optic cables, coaxial cable and associated equipment, (i.e., optical electronic nodes, amplifiers, taps, etc.), all of which can provide two-way transport; a key component of telephony services."<sup>26</sup> The Department further stated that "[t]here are approximately 1,600 nodes currently deployed, which in the opinion of the Department, can accommodate two-way communications to consumers throughout the Telco's HFC network."<sup>27</sup> Thus, the Department's unbundling decisions clearly contemplated unbundling and competitive access to the Big UNE proposed by Gemini, or at a minimum, more than just the coaxial cable proposed by SBC. SBC's position that only the

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<sup>23</sup> Decision, Docket No. 03-01-02, Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Concerning the Southern New England Telephone Company's Unbundled Network Elements, Dec. 17, 2003 at 34.

<sup>24</sup> Id. at 37.

<sup>25</sup> Id. at 42.

<sup>26</sup> Decision, Docket No. 03-01-02RE01, Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Concerning the Southern New England Telephone Company's Unbundled Network Elements, Aug. 25, 2004 at 6.

<sup>27</sup> Id.

coaxial cable is available to Gemini directly contravenes the Department's intent in unbundling the HFC network.

SBC never took exception to the Department's definition of the UNE as inclusive of far more than just the coaxial cable. SBC only pursued its position that the Department had exceeded its authority in ordering the unbundling.

### **SBC's Position**

Despite this clear interpretation and guidance on the definition of the UNE and the portions of the abandoned HFC network to which Gemini is entitled access, SBC has maintained throughout the interconnection negotiation that Gemini may only access the coaxial cable portion of Tier 3 of the abandoned HFC network. For the reasons detailed above, as well as the technical limitations such a restriction would impose as detailed in the specific issues below, Gemini believes SBC's position is inconsistent with the Department's intent and understanding of the HFC UNE.

### **B. Big UNE Specific Issues (Exhibit 1)**

As detailed earlier in this filing, the Department must first make a fundamental determination whether it intended its unbundling orders to encompass only the coaxial cable, as SBC proposes, or those portions of Tier 3 of the abandoned HFC network as requested by Gemini. In order to further the arbitration process, the parties attempted to negotiate two separate Appendices, a Big UNE Appendix and a Little UNE Appendix.

Gemini's Big UNE proposal includes all remaining portions of Tier 3 of the abandoned HFC network, including the coaxial cable, node optronics, node housings, and fiber tail, among others. SBC's Little UNE proposal excludes all components of the network, except for the

coaxial cable, and goes so far as to exclude any coaxial cable located beyond any gaps in the plant.

In the event that the Department determines that Gemini's Big UNE approach is more appropriate, the parties request that the Department resolve the following outstanding issues with respect to the Big UNE Appendix. In the event that the Department determines that Gemini is entitled access to only the coaxial cable portion of the HFC network and nothing else, the issues contained in this section may be disregarded.

Additionally, there are several provisions of the Big UNE Appendix for which SBC made no proposal at all, and simply left a notation of "TBD" (to be determined). These include critical issues such as pricing and billing. Although SBC did make some notations with respect to pricing that Gemini fundamentally disagrees with (i.e., Gemini should not pay nonrecurring charges for connections made by its personnel or contractors; the dark fiber rates (non-HFC) that SBC intends to apply are irrelevant to the Fiber Tail element), Gemini does not herein address the pricing issues as there is no definite proposal provided by SBC. Gemini will address the pricing issues and other issues not yet addressed by SBC at such time as it receives and has an opportunity to review SBC's proposal in full.

#### **1. Issue Presented – Legal Language**

SBC's legal interpretive language is unnecessary to the Interconnection Agreement and should be excluded. (Sections 1.1; 1.2; 1.3)

#### **Gemini Position**

Throughout both the Big UNE and Little UNE Appendices, SBC has included legal language concerning reservation of its rights to challenge the DPUC's orders unbundling the HFC network and relating the unbundling order to the FCC's *Triennial Review Order* and other

orders. Gemini believes that this language does not add anything to the Appendix, unnecessarily raises complicated legal questions that SBC is already pursuing through the courts and at the FCC, and attempts to provide a loophole through which SBC can obstruct or otherwise hamper Gemini's access to the HFC facilities.

Gemini does not believe that it should be compelled to adopt SBC's legal interpretation of anything, especially since Gemini disagrees with many of SBC's legal interpretations.

Gemini requests that this language be stricken from the Appendix.

### **SBC 's Position**

SBC did not provide Gemini with its rationale on this issue.

## **2. Issue Presented – Third Party Access Language**

SBC's language that it has not provided third party access to the HFC facilities is unnecessary. (Section 1.4)

### **Gemini's Position**

Gemini fundamentally disagrees with SBC's assertion that SBC has not previously provided access to the HFC facilities to a third party. Gemini believes that third party access was provided to SNET Personal Vision, Inc. Gemini has no information as to whether any other third party has been provided with access to any portion of the HFC network. Gemini does not believe that this language adds anything to the Interconnection Agreement and feels it is unnecessary and designed to bootstrap any arguments Gemini may seek to make in SBC's appeals of the Department's unbundling orders as to prior users and uses of the HFC network. Gemini does not object to the last sentence of this section providing for dispute resolution. Gemini requests that this entire section, other than the last sentence, be stricken.

### **SBC's Position**

SBC has not provided Gemini with the rationale behind its inclusion of this language.

#### **3. Issue Presented - Testing**

Gemini should not have to wait for SBC to perform “operational readiness testing through a separate testing environment that fully reflects the functionality and/or capabilities of the existing HFC facilities.” (Section 1.5)

### **Gemini's Position**

Gemini has consistently sought unbundled access to the HFC network in “as is” condition. SBC has also consistently testified that it no longer has employees or technicians familiar with or trained in HFC technology. Gemini is concerned that SBC will delay provision of the HFC network until such time as it performs its “operational readiness testing.” Additionally, SBC has testified that the HFC network is nonfunctional. Gemini has committed to upgrade and repair the network. Gemini is unaware of how SBC will make the HFC network “operationally ready” or test a nonfunctional network. Gemini is seeking access to a “dark” facility, while SBC’s language implies a “lit” facility. Gemini believes that this section is unnecessary and designed to further delay and hamper Gemini’s access to the network.

### **SBC's Position**

SBC did not provide Gemini with its rationale for including this language.

#### **4. Issue Presented – Node Housing vs. RT**

The appropriate descriptive term is “Node Housing,” not “HFC Remote Terminal.” (Section 1.6.6, and throughout the Appendix)

### **Gemini's Position**

Gemini believes it is wholly inappropriate for SBC to define the Node Housing portion of the HFC network as a Remote Terminal. Collocation at a Remote Terminal is typically handled via CRTEE collocation, which is specifically designed for outside plant pedestals, cabinets and vaults used for accessing twisted copper pair distribution subloops. The Node Housing is a far smaller, specialized housing that holds the active optical transition node hardware, and has no applicability or analogy outside of the HFC network. Unlike Remote Terminals used in CRTEE, a Node Housing has no power supply or active ventilation, and does not occupy significant real estate, being entirely located within the relevant gain on the pole.

Gemini believes that SBC is seeking to transform the Node Housing into a Remote Terminal in order that SBC may charge exorbitant and inapplicable collocation fees, rather than have the Node Housing part of the HFC UNE and built into the cost of the UNE, as proposed by Gemini. Additionally, Remote Terminals are specifically associated with Subloops, and Gemini believes that SBC is trying to shoehorn unbundling of the HFC network into the category of a Subloop. While SBC's original HFC network did extend Tiber Tails to the wire center, Gemini is only seeking a Fiber Tail to an optical point of demarcation, typically a place in the outside plant where Gemini's fiber trunk will connect to SBC's facilities. The Fiber Tail Gemini seeks to use will go to the wire center only in cases where the node is relatively close to the wire center and it thus, becomes a convenient point of demarcation.

Gemini lastly notes that SBC has proposed removing "optical signal" from the definition in Section 1.6.2. However, in Gemini's Big UNE proposal, the Fiber Tail passes optical signals. Thus Gemini requests that the words "optical signal" be retained in the definition.



### **SBC's Position**

SBC did not provide Gemini with its rationale for referring to the Node Housing as a Remote Terminal, other than that is what it believed it should be called.

#### **5. Issue Presented – Access to Power Ports and Power Inserter**

SBC should not have the right to define where Gemini may access node power ports or power inserter devices. (Section 1.6.17)

### **Gemini's Position**

Gemini has requested access to the HFC network, where is and as is. Gemini has also committed to upgrade and repair the network at its own expense. Accordingly, Gemini believes it should be able to access, install or repair node power ports or power inserter devices in accordance with its upgrade and repair plans, in accordance with industry standards, and not at SBC's direction or under SBC's control. SBC's proposal is needlessly restrictive, as SBC may fail to identify a necessary point or Gemini may need to add an additional point in the course of network maintenance.

### **SBC's Position**

SBC did not provide Gemini with its rationale for requiring that SBC identify where Gemini may access node power ports or power inserter devices.

#### **6. Issue Presented – Uniqueness of the HFC Network**

The uniqueness of the HFC network should be clarified. (Section 1.6.24)

### **Gemini's Position**

Gemini has proposed language to clarify that the HFC network is a unique UNE that is not covered by the FCC's definitions of hybrid-fiber copper networks or subloops. Gemini believes that the language proposed by Gemini is actually beneficial to SBC. During the parties'

negotiations, SBC expressed concern that third parties would use this HFC UNE Appendix to support unbundling of various other types of nodes in other types of SBC networks in other states. Gemini believes that clarifying the uniqueness of the HFC plant at issue would aid SBC in preventing third parties from relying on this Interconnection Agreement in other states in support of unbundling other types of nodes. To Gemini's knowledge, no other ILEC in the country owns an abandoned HFC network.

### **SBC's Position**

SBC did not provide Gemini with its rationale for objecting to this clarifying language.

### **7. Issue Presented – Permissible Services**

Gemini is not limited in the use of the HFC UNE to the provision of retail telecommunications services. (Section 2.1 and throughout the Appendix)

### **Gemini's Position**

As recognized in the Department's decision to unbundle the HFC network,<sup>28</sup> as long as Gemini is providing a qualifying service, it may provide additional nonqualifying services.

<sup>29</sup>Gemini has sought in the negotiations to clarify its ability to provide nonqualifying and wholesale services over the HFC network. Gemini has committed, and is licensed, to provide retail voice service. Additionally, Gemini has committed to the Department to allow wholesale access to the facilities by other providers, including Internet Service Providers. SBC seeks to limit Gemini's use of the abandoned HFC facilities to the provision of retail telecommunications services.

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<sup>28</sup> Decision, Docket No. 03-01-02, Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding the Unbundled Network Elements of the Southern New England Telephone Company, Dec. 17, 2003 at 38.

<sup>29</sup> Based on Gemini's limited review of the new UNE rules issued February 4, 2005, the FCC has rescinded the qualifying services test, replacing it with a test of the competitiveness of the service in the market. Notwithstanding the foregoing, local exchange service remains as the primary service for which UNEs are made available. Gemini remains committed to the provision of local exchange service.

As long as Gemini is providing a qualifying service, as determined by the FCC<sup>30</sup> and the Department, SBC is precluded from interfering with Gemini's provision of any other service, qualifying, non-qualifying or wholesale. Once Gemini has legitimately obtained access to a UNE for a qualifying service, it is permitted to use that UNE for the provision of any additional services, qualifying, nonqualifying or wholesale, absent interference by or permission from SBC.

### **SBC's Position**

SBC asserts that Gemini may only provide nonqualifying services to Gemini retail customers who subscribe to Gemini retail telephony.

## **8. Issue Presented – Applicable Standards**

Under what standards must HFC network elements be provided? (Section 2.8)

### **Gemini's Position**

Gemini believes that the HFC network elements should be provided in accordance with industry standards governing the performance, maintenance and repair of HFC plant. Gemini questions what technical publications or other written documents SBC references and objects to SBC's proposal to allow SBC to change those standards at any time in its sole discretion. Gemini notes that it has been more than ten years since SBC constructed the HFC network and that the standards under which SBC constructed and maintained the HFC network have changed since that time. Gemini further notes that SBC does not have standards for the operation, maintenance and repair of the HFC network since the HFC network has been abandoned by SBC.

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<sup>30</sup> The FCC reinforced its view that "other" services may be bundled with local exchange service in the new UNE rules.

As recognized in the Department's Decision,<sup>31</sup> many companies are currently using HFC for the provision of telephony and other services. There are industry standards adhered to by those companies and other broadband service providers that are applicable to Gemini's use of the HFC network.

### **SBC's Position**

SBC questions the industry standards to which Gemini refers.

### **9. Issue Presented – Qualifying Services**

SBC may not dictate Qualifying Services conditions. (Section 2.9)

### **Gemini's Position**

Gemini objects to the imposition of qualifying services conditions by SBC. Gemini submits that the FCC and the Department, and not SBC, have the authority to dictate what constitutes a qualifying service.<sup>32</sup> Gemini has committed in sworn testimony before the Department to abide by the law on this issue, as interpreted by the FCC and the Department.<sup>33</sup> Gemini believes that, in accordance with the law as it currently stands, Gemini need only *offer* a qualifying service to all subscribers. If some of the services that Gemini offers are not qualifying, Gemini believes it can still provide these services to individual subscribers that may not be subscribing to qualifying services. Gemini prefers to define qualifying services in the context of applicable law, and not in SBC's limited historical view.

Gemini further believes that SBC's proposed definition of "common carrier" is unnecessary and needlessly restrictive.

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<sup>31</sup> Decision, Docket No. 03-01-02RE01, Aug. 25, 2004 at 5.

<sup>32</sup> See note 28, Supra.

<sup>33</sup> See Testimony of Arnold Chase in Docket No. 03-01-02RE01

Gemini objects to SBC's proposed ban on the provision of wholesale services. Gemini intends to provide wholesale services to Internet Service Providers and other CLECs, so that the HFC plant can be made available to the largest number of potential users. SBC has provided no basis or other justification for its exception.

### **SBC's Position**

SBC believes that Gemini must provide a qualifying service to each and every residential or business end user being provided service over the HFC UNE.

### **10. Issue Presented - OSS**

SBC must consult with Gemini before developing expensive and potentially needless OSS or other processes. (Section 2.10)

### **Gemini's Position**

Consistent with the Department's Decision,<sup>34</sup> Gemini believes that the ordering process can be easily accomplished manually and does not believe special OSS platforms need to be developed. Gemini requests that SBC consult with Gemini prior to the development of any OSS or processes. Gemini fears that this "catch all" provision may be used as a way to impose exorbitant and unnecessary costs on Gemini for use of the HFC UNEs.

### **SBC's Position**

SBC's position is that this is a catch-all provision for various HFC unbundling processes, all of which have yet to be determined.

### **11. Issue Presented – Repair and Replacement**

SBC must replace or repair missing or defective HFC components. (Sections 3.2; 3.4)

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<sup>34</sup> Decision, 03-01-02, Dec. 17, 2003 at 45.

### **Gemini's Position**

Gemini has consistently maintained that it desires access to the HFC network “as is” and “where is.” Gemini has further committed to repair and upgrade the abandoned HFC network facilities in order to make them usable. On the other hand, SBC has consistently asserted that it will not allow Gemini to repair or upgrade the HFC network and that all work on the HFC network must be performed by SBC technicians.<sup>35</sup>

While Gemini believes that qualified contractors should be permitted to upgrade, repair and maintain the HFC network as further discussed below, in the event that the Department determines that only SBC may upgrade, repair and maintain the HFC network, SBC must be required to actually perform the work. As proposed by SBC, Section 3.2 would excuse SBC from upgrading, maintaining and repairing the HFC network, thus rendering the unbundled facilities practically useless.

SBC also defines the available plant as ending at the first gap in the contiguous coaxial cable, and states that it will not repair or replace any gaps. Based on Gemini's knowledge and belief, Gemini believes that this provision will strand as useless much of the existing plant. Gemini believes that gaps in the coaxial cable plant must be filled so that the entire coaxial facility can be utilized. Gemini has offered to perform this replacement itself, at its own expense, thus leaving SBC with a complete, end-to-end usable facility when Gemini is done leasing it. Gemini further believes that SBC's provision conflicts with SBC's obligations pursuant to the Stipulation.<sup>36</sup>

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<sup>35</sup> Gemini addresses this issue later in this Petition.

<sup>36</sup> Stipulated Settlement, SNET v. DPUC et al., CV-03-0520409-S, April 15, 2003 (attached hereto as Exhibit D (“Stipulation”).

SBC also desires that all repairs be solely at Gemini's expense. While Gemini has committed to bearing the expense for repairing the HFC network, Gemini believes a more equitable pricing methodology would be a base pricing model that includes credit for sections of the HFC plant that require repair, which sections Gemini could then repair.

### **SBC's Position**

SBC has failed to provide Gemini with a rationale for its position.

### **12. Issue Presented – Bridging Gaps**

If repairs or replacements bridge an existing gap within the existing HFC plant, the plant on both sides of the gap must be made available and included as part of the UNE. (Section 3.5.1.1)

### **Gemini's Position**

Gemini believes that in order to give effect to the intent of the Department's decisions in Docket Nos. 03-01-02 and 03-01-02RE01 and maximize the use of the abandoned HFC network that is currently occupying valuable pole space, Gemini should be able to access all of the remaining HFC network. Gemini believes that there is no rational basis for excluding and stranding large portions of otherwise usable plant, except to prevent competitive use of that plant.

Additionally, Gemini believes that, for any plant repaired or replaced by Gemini, Gemini should pay a reduced monthly recurring charge. The pricing for these components should recognize the incomplete and unusable plant and such incomplete and unusable plant should not be billed at the same rates as complete, usable plant that requires no repairs by Gemini.

### **SBC's Position**

SBC has provided no rationale for its desire to exempt facilities existing past a gap in the coaxial cable from use by Gemini.

### **13. Issue Presented - Stipulation**

SBC must comply with the Stipulation. (Sections 3.5.1.2; 3.5.2.4; 3.5.3.3)

### **Gemini's Position**

Gemini submits that SBC must comply with the terms of the Stipulation, that mandate that SBC replace those portions of the coaxial cable that it removed after the effective date of the Stipulation, irrespective of whether or not Gemini has placed an order for use of those facilities. SBC has no ability or discretion with respect to this issue, as per the terms of the Stipulation.

### **SBC's Position**

SBC has provided no support or rationale from its deviation from the explicit terms of the Stipulation.

### **14. Issue Presented – Repair and Replacement by Gemini**

Gemini should be able to replace RF amplifiers, frequency splitters or other active or passive equipment within the HFC plant. (Section 3.5.1.3)

### **Gemini's Position**

Gemini's ability to repair and upgrade the more than ten year old plant and components is critical to Gemini's ability to use the HFC plant to provide services, especially since the plant has not been maintained and has simply been allowed to deteriorate over the years. Gemini has committed in its draft language in the Appendix, as well as at hearing before the Department, to the repair and replacement of such components at its own expense and further, that any such replacements or repairs will remain the property of SBC.



### **SBC's Position**

SBC's position is inexplicably to prevent Gemini from repairing or replacing any components at any time. SBC desires that Gemini attempt to use the plant in its decrepit condition, and that if the plant is inoperable, it is unavailable.

#### **15. Issue Presented – Replacement of Node Housing and Optronics**

Gemini should be able to replace the Node Housing and Node Optronics, and access and utilize the Node Housings and Node Optronics. (Sections 3.5.2; 3.6.2, 3.6.3)

### **Gemini's Position**

Gemini's goal throughout this arbitration proceeding, as it has been since Gemini first approached SBC in June 2002, is to obtain access to a functional network over which it can provide competitive services. SBC's goal is apparently to break down the network into small piecemeal components, with the failure or unavailability of any one small component to negate Gemini's ability to access the entire coaxial run.

During the course of negotiations, SBC revealed to Gemini that many of the Node Optronics may be missing or nonfunctional. The Node Housings are more than ten years old. In order to make the HFC plant usable, Node Optronics must be made available. Gemini has committed, at its own expense, to supply Node Optronics in the event any are missing or nonfunctional. However, because the Node Housings are more than ten years old, based on Gemini's investigation of the model number on the existing Node Housings, new Node Optronics will not fit in the old Node Housings. Thus, not only does Gemini require the ability to replace missing or nonfunctional Node Optronics, but also the Node Housings to ensure proper fit.

Gemini objects to SBC characterizing the Node Housing as “mandated shared space.” Gemini believes that the terminology “mandated shared space” is appropriate for shared cabinets used in ordinary copper-loop outside plant collocation. However, the Node Housing associated with the HFC plant is dedicated space, as no other carrier makes use of the facilities inside it.

Gemini also objects to the application of existing collocation rates to the Node Housing. Existing collocation rates were designed for an entirely different network architecture with an entirely different cost basis, which is far costlier than the HFC Node Housing. Gemini does not agree that a monthly recurring rate for use of the Node Housing is appropriate, but believes that all of the components of the HFC network element should have a single monthly recurring charge, with a credit for any missing components, such credit to be based on the unique costs associated with the missing component.

#### **SBC’s Position**

SBC is trying to shoehorn as much of the HFC plant as possible into SBC’s existing UNE categories, in order that it can charge inappropriate component rates for portions of the HFC network.

#### **16. Issue Presented – Fiber Tail**

Gemini must be able to access the Fiber Tail. (Sections 3.5; 3.6)

#### **Gemini’s Position**

This issue is critical in both the Big UNE and Little UNE Appendices. Gemini seeks to use, for a cost-based fee, a fiber optic “tail” that connects the Node Housing to Gemini’s own fiber optic trunk facilities. SBC refuses to recognize the existence of the Fiber Tail, declaring that Gemini is seeking “fiber feeder.” Gemini asserts that there is a substantial difference, and that the Fiber Tail is a different component, unique to the HFC network. “Fiber feeder” in the

sense used in the FCC's Triennial Review Order connects the central office to a remote terminal which, in typical outside plant engineering (Carrier Serving Area standard), serves a radius of up to 12,000 feet of copper distribution subloop. Fiber Tail is typically much shorter, providing access from the Node Housing back to Gemini's own trunk fiber. The purpose of the Fiber Tail is to reduce the requirement for the trunk to be connected by Gemini to every single Node Housing, whose service area is far smaller (typically 200 homes within 3,000 feet) than a copper Remote Terminal. Instead, Gemini wishes to connect to the Fiber Tail at a technically feasible point, where several Fiber Tails can be aggregated. In the case where a Node is close to a central office, Gemini desires that the point of interface be at a connector panel located inside the central office collocation area. Without the use of any Fiber Tail, Gemini will have difficulty reaching many of the Node locations, because (unless overlashing is permitted, which SBC has already declined<sup>37</sup>), Gemini's fiber trunk will require a separate gain on the poles in order to connect. As the Department is aware, the fact that there is no room currently on most of the poles is a major reason why Gemini's initial Petition was filed in January 2003.

Gemini also believes that it is reasonable to request SBC to provide substitute fiber where spare fiber is available in the event of a failure.

### **SBC's Position**

SBC believes that Gemini is seeking fiber feeder. SBC desires that Gemini only be provided with fiber pursuant to its dark fiber tariff.<sup>38</sup> (Sections 3.5;4.11.1;4.12.3;5.1)

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<sup>37</sup> See discussion infra at VI B.24.

<sup>38</sup> Gemini notes that the new unbundling rules were released by the FCC on February 4, 2005. Those new rules eliminate fiber feeder as a UNE. Although SBC currently has a dark fiber tariff, Gemini assumes that SBC will seek to withdraw that tariff in light of the new UNE rules. Thus, the lack of a fiber tail will mean that Gemini must pull its own fiber to every single node.

**17. Issue Presented – Connection of Drop Wires**

Who may connect Gemini-owned drop wires to SBC-owned terminating tap ports?

**Gemini's Position**

Gemini believes that duly qualified contractors or other personnel should be permitted to connect Gemini-owned drop wires to SBC-owned terminating tap ports (the point at which the subscriber drop gains access to the coaxial cable). The connection to the terminating tap port is a simple coaxial connector, requiring no special skill to connect. Under SBC's proposal that only SBC technicians connect the drop wire to the terminating tap port, Gemini would have to install the drop wire, hang it on the pole untested, and then place a service order to SBC for a truck roll for the sole purpose of plugging a coaxial cable into a socket. Such a proposal needlessly delays service installation and makes diagnostics unnecessarily more difficult.

Furthermore, Gemini may need to test signal level at the tap port before making a connection to a drop. Such testing is not possible under SBC's proposal.

**SBC's Position**

SBC believes that only its own technicians may connect Gemini's drop wires to the terminating tap port.

**18. Issue Presented – Place of Interconnection**

Where may Gemini interconnect its coaxial plant with the HFC UNEs? (Section 3.7)

**Gemini's Position**

Gemini believes that, consistent with applicable law, it should be allowed to interconnect its own coaxial plant with the HFC UNE at any technically feasible point, which may include, but not be limited to, the Node Housing, the end point of the coaxial cable or an intermediate point on the coaxial cable.

### **SBC's Position**

SBC is trying to limit Gemini to interconnecting Gemini's coaxial cable at the Node Housing or the Terminating Tap Port.

#### **19. Issue Presented – Pilot Carrier and RF Levels**

SBC cannot mandate pilot carrier levels (Section 3.8.1.1.1) or RF levels for terminating tap ports. (3.8.1.1.2)

### **Gemini's Position**

SBC's proposal calls for Gemini to provide pilot carriers on its plant. Such would normally be required for SBC's continued performance of RF-related installation and maintenance activities of the coaxial plant, which would use these carriers for diagnostic purposes. However, Gemini has requested the use of the coaxial plant "dry," or "dark" wherein Gemini will control the lighting of the coax, via nodes leased from SBC or owned by Gemini. In such a case, Gemini, and not SBC, should specify its own pilot carriers.

SBC has also specified analog RF levels for terminating tap ports. This would be appropriate in the context of an SBC-owned and managed node, and may set an appropriate metric for the capability of the plant, to determine, for instance, if an amplifier is defective. However, Gemini believes that this is needlessly detailed. Gemini instead requests the ability to access terminating tap ports, as well as to add and change them as required to properly balance the signal levels of the network.

### **SBC's Position**

SBC has not provided its rationale for requiring Gemini to adhere to SBC's performance specifications.

## **20. Issue Presented – Maintenance and Repair**

What entities may perform maintenance and repair of the HFC facilities? (Sections 3.6.4.1; 3.8.4.2 and throughout the Appendix)

### **Gemini's Position**

The Department's decision in the reopened docket states:

Therefore, the Department will require the Telco and Gemini to negotiate, as part of their interconnection agreement, the applicable rates and charges that Gemini would incur when Company or Telco approved technicians repair, upgrade and maintain the HFC facilities that are located in the communications gain in the public rights of way.<sup>39</sup> In the opinion of the Department, contracts of this nature are consistent with the FRO and Verizon and should address those issues raised by the Telco relative to negative network reliability.<sup>40</sup>

SBC's position is that the Department's ruling means that only SBC personnel may perform maintenance on the HFC facilities. Gemini believes that this is an unnecessarily restrictive interpretation of the Department's ruling. The Department's ruling clearly left open the possibility that qualified contractors or subcontractors approved by SBC could perform the necessary maintenance work. This is a critical issue in light of the fact that SBC currently has no trained or qualified personnel and has not made any attempt to train or otherwise hire personnel to perform maintenance work.

Throughout the underlying administrative proceedings concerning the HFC network, as well as the Superior Court and FCC appeals, SBC has repeatedly stated that it has no personnel trained or qualified to maintain the HFC UNES.<sup>41</sup> SBC also admittedly used contractors

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<sup>39</sup> In so doing, the Department believes that Telco network reliability and security should be preserved. See Verizon Communications, Inc. v. FCC, 535 U.S. 467, 536 (2002); FRO, 203

<sup>40</sup> Decision, Docket No. 03-01-02RE01, Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Concerning the Unbundled Network Elements of the Southern New England Telephone Company, Aug. 25, 2004 at 4. (emphasis added) (footnote in original).

<sup>41</sup> See, e.g., Docket No. 03-01-02, Reply Comments of The Southern New England Telephone Company, Sept. 26, 2003 at 28 ("the Telco no longer has technicians trained to work on the coaxial facilities and has sold the equipment necessary for such testing, maintenance and repair.").

predominantly to perform maintenance on the HFC facilities and to remove customer drops and “dead plant” after announcing its intention to discontinue its use of the HFC network.<sup>42</sup>

SBC is in no position to maintain or repair the HFC network, especially since SBC has no incentive to adequately maintain, repair or upgrade the HFC facilities. SBC has not repaired or maintained the remaining coaxial portions of the HFC plant since its abandonment. SBC does not intend to utilize the HFC plant. Indeed, SBC has every incentive to delay and inadequately maintain the HFC facilities. Any agreement that permits only SBC personnel, and not qualified contractors, to work on the HFC facilities invites further delay while SBC attempts to hire and train personnel and foreshadows numerous additional regulatory proceedings wherein Gemini will have to seek Department orders to force SBC to provide adequate maintenance and repair.

The Department has encountered the issue of maintenance and repair of utility facilities on at least one prior occasion. In Docket No. 00-03-08, DPUC Review of The Connecticut Light and Power Company’s Customer Service Policies and Charges, CL&P asserted that “the integrity of its distribution system would be compromised if it allows towns to install, connect, disconnect or otherwise maintain streetlights.”<sup>43</sup> The Department rejected CL&P’s contention.

The safety of the personnel that work on CL&P’s distribution system is of utmost concern to the Department. Further, the integrity of CL&P’s infrastructure must be maintained to assure system reliability. However, there are non-CL&P personnel that have met CL&P’s qualifications for working on the system and are maintaining the distribution system at this time. With the exception of the physical connection to the secondary conductor, it does not appear that the type of work that is involved in the installation, removal and maintenance of streetlights would compromise CL&P’s system. Therefore, qualified non-CL&P personnel can perform these tasks. Any contractor employed by the town to do this work would be required to obtain all necessary training, certification and to be properly insured before it could perform streetlight maintenance. In addition, the contractor would be required to demonstrate to CL&P’s satisfaction that an

<sup>42</sup> See, e.g., Docket No. 03-01-02RE01, Tr. 6/14/04 at 268, 299-301.

<sup>43</sup> Decision, Docket No. 00-03-08, DPUC Review of The Connecticut Light and Power Company’s Customer Service Policies and Charges, July 11, 2001 at 9.

individual is qualified to do this work. Therefore, the Department rejects CL&P's proposal that only Company personnel can perform streetlight maintenance work with the exception of connecting to the secondary conductor.<sup>44</sup>

Gemini has requested exactly what the Department ordered in the streetlight proceeding. There is also less concern with the reliability of SBC's presently abandoned HFC facilities than CL&P's distribution system. Only 20% of SBC's existing HFC plant comes into contact with any portion of the plant that SBC is still using. The Department has reached similar conclusions allowing the use of qualified contractors for maintenance and repair work within the existing gains of other utility companies.<sup>45</sup>

### **SBC's Position**

SBC maintains that only its technicians may perform maintenance and repair work on the facilities, despite the Department's ruling and the fact that SBC itself predominantly used contractors to construct and deactivate the HFC network.

### **21. Issue Presented – Performance Specifications**

Performance specifications should not be based on "as-built" standards. (Section 3.8.5)

### **Gemini's Position**

SBC's proposed system performance specifications are based on signal levels at specified access points, following as-built specifications that are unknown to Gemini and, being more than ten years old, may be obsolete or inappropriate. Gemini has suggested that the components be required to perform per industry standard practices, which will also take into account any replaced or upgraded components.

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<sup>44</sup> Id.

<sup>45</sup> See Decision, Docket No. 00-03-12, Application of the City of Groton for a Certificate of Public Convenience and Necessity, Apr. 11, 2001 at 4.



### **SBC's Position**

SBC wants system performance to be based on as-built criteria.

#### **22. Issue Presented – Components to be Repaired**

SBC cannot have discretion concerning what to repair. (Sections 3.9.2; 3.9.3)

### **Gemini's Position**

SBC has proposed that it have discretion whether or not to perform repairs. Gemini notes that if SBC refuses to perform maintenance or allow maintenance to be performed, Gemini will not have meaningful access to the HFC UNEs. The HFC UNEs are more than ten years old and have not been maintained or repaired since they were abandoned by SBC. In the event that SBC refuses to perform repairs, Gemini should be provided with all necessary access to perform its own repairs of the HFC UNEs. Further, SBC may not be able to perform repairs, even to the extent normally done for UNEs. Therefore, Gemini should be afforded credits to the monthly recurring charges for repairs not performed by SBC.

### **SBC's Position**

SBC maintains that only its own technicians may perform maintenance and repair on the HFC facilities, despite the fact that SBC predominantly used contractors to construct and deactivate the HFC network.

#### **23. Issue Presented – Collocation**

Collocation is inappropriate for the HFC. (Sections 3.9.5 through 3.9.11; 4.3)

### **Gemini's Position**

Gemini should not be required to establish a collocation arrangement simply to access the HFC network. No other carriers will be utilizing the HFC facilities, which makes collocation unnecessary.

### **SBC's Position**

SBC's position is that standard collocation must be used to access the HFC UNE.

#### **24. Issue Presented - Overlashing**

Gemini must be able to overlash its facilities where necessary. (Section 3.10)

### **Gemini's Position**

Gemini requests that it be permitted to overlash its fiber to SBC's facilities, much as SBC currently does, in places where poles are congested. Gemini's ability to reach access points with its own trunk fiber is impaired by the congestion on the poles.

Although overlashing has not been mandated anywhere in the United States to Gemini's knowledge, it has been strongly encouraged on a routine basis by both the FCC and the Department. In its Report and Order governing pole attachments, the FCC stated:

The record does not indicate that third party overlashing adds any more burden to the pole than overlashing one's own pole attachment. We do not believe that third party overlashing disadvantages pole owners in either receiving fair compensation or in being able to ensure the integrity of the pole. Facilitating access to the pole is a tangible demonstration of enhancing competitive opportunities in communications. Allowing third party overlashing will also reduce construction disruption (and the expense associated therewith) which would otherwise likely take place by third parties installing new poles and separate attachments. Accordingly, we will allow third party overlashing subject to the same safety, reliability and engineering constraints that apply to overlashing one's own pole attachment. Concerns that third party overlashing will increase the burden on the pole can be addressed by compliance with generally accepted engineering practices.<sup>46</sup>

The FCC's position on overlashing is that "[o]verlashing capability continues to be a facet of a pro-competitive market because it maximizes the usable capacity on a pole."<sup>47</sup>

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<sup>46</sup> Report and Order, CS Docket No. 97-151, In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, 13 FCC Rcd 6777 (Feb. 6, 1998) at ¶ 68, aff'd, Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co., 534 U.S. 327 (2002).

<sup>47</sup> Id. at ¶ 60.

The FCC later clarified and reaffirmed its position on overlashing, stating that it “declared our continued approval of, and support for, third party overlashing, subject to the same safety, reliability, and engineering constraints that apply to overlashing one’s own pole attachment.”<sup>48</sup> “The commission has recognized overlashing as a legitimate and desirable practice, especially because utility poles are often regarded as essential facilities.”<sup>49</sup>

The Department has also recognized the benefit of and encouraged overlashing.<sup>50</sup> The Department’s findings with respect to overlashing were made at the specific request of SBC.

Furthermore, the Telco requests that the Department recognize and require that where structurally feasible, the overlashing of lines or cables be implemented to accommodate additional cables and that such a construction method constitutes one attachment. Lastly, the Telco indicates that it is working with Manchester and has recommended the overlashing of cables as a mean of eliminating improper spacing on poles. In the opinion of the Telco, as long as the integrity of the pole is not compromised, the overlashing of numerous lines is acceptable as new or additional space on the pole is not utilized. Telco Written exceptions, pp. 4, 7, 10 and 11.<sup>51</sup>

In the Manchester proceeding cited above, overlashing did not create any maintenance issues or technical concerns for SBC. SBC also has a pole attachment price contained in its tariffs and pole attachment agreements for overlashing entities. SBC cannot be permitted to speak from both sides of its mouth. What is technically and operationally prudent for competitors, according to SBC, must be considered technically and operationally prudent for SBC.

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<sup>48</sup> Consolidated Partial Order on Reconsideration, FCC 01-170, In the Matter of Amendment of Commission’s Rules and Policies Governing Pole Attachments; In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, 16 FCC Rcd 12103 (May 22, 2001) at ¶ 73.

<sup>49</sup> Id. at n.254 (citations omitted).

<sup>50</sup> Decision, Docket No. 99-03-25RE01, Application of The Southern New England Telephone Company for a Declaratory Ruling Regarding Municipal Use of Poles and Conduits – Municipal Gain, May 17, 2000 at 3.

<sup>51</sup> Id.

### **SBC's Position**

SBC's position is that it does not permit overlashing, despite the fact that SBC itself overlashes when it is convenient to do so.

### **25. Issue Presented – Use of Power Supplies**

Gemini should be able to use existing power supplies, where available. (Section 6)

### **Gemini's Position**

Gemini seeks to be able to use existing power supply equipment, where it exists, not including batteries. Gemini accepts full responsibility for the cost of power itself. Gemini should further be allowed to remove and return nonfunctioning power equipment to SBC.

### **SBC's Position**

SBC does not want Gemini to be able to access the power supplies.

### **26. Issue Presented – Access to Gain**

Gemini must be able to access the existing gain that contains the HFC plant. (Section 7)

### **Gemini's Position**

Gemini believes that, for purposes of network continuity, it should be permitted to add additional necessary facilities or equipment not previously installed by SBC in the same gain the the HFC network occupies.

### **SBC's Position**

SBC believes that Gemini should place its additional equipment and facilities in the CLEC gain. However, SBC will not allow Gemini to run fiber down the pole from the gain SBC wants it to use to the gain occupied by the HFC network, thus rendering the HFC network unusable.

## 27. Issue Presented – Inventory

Field surveys should be based on the existing Arthur Anderson inventory (Section 8).

### Gemini's Position

Gemini believes that SBC's preordering process is unnecessary and costly. SBC maintains enough relevant information with respect to the HFC Network to suit both parties' needs and to obviate the need for any costly preordering process.

In its compliance filing for Order No. 1, dated May 1, 2001, in the SPV Franchise Relinquishment docket,<sup>52</sup> SBC stated as follows:

The Companies have engaged consultants from the firm Arthur Andersen ("AA") to assist in estimating the value of the assets contained in Major Asset Category 1, which is comprised of all the associated components in the coaxial portion of the HFC Network. Telco provided AA a list of components of the entire HFC network and their associated original purchase and installation costs. Telco also identified separately the components of the coaxial portion of the HFC network that may be available for sale, lease or tariff and those components of the HFC network that will be re-used by SNET and are not available for disposition.<sup>53</sup>

Thus, a complete inventory of the existing plant was available as of May 1, 2001.

Although SBC has claimed that the 2001 inventory is incomplete and unreliable, as SBC has systematically removed and disposed of portions of the HFC network, during SBC's appeal of the Department's order that it cease removing portions of the HFC network pending the outcome of Docket No. 03-01-02,<sup>54</sup> SBC stated that it had actually removed very little of the

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<sup>52</sup> Docket No. 00-08-14, Application of Southern New England Telecommunications Corporation and SNET Personal Vision, Inc. to Relinquish SNET Personal Vision, Inc.'s Certificate of Public Convenience and Necessity.

<sup>53</sup> SBC Compliance Filing, Order No. 1, Docket No. 00-08-14, Application of Southern New England Telecommunications Corporation and SNET Personal Vision, Inc. to Relinquish SNET Personal Vision Inc.'s Certificate of Public Convenience and Necessity, May 1, 2001 at 2 (emphasis added).

<sup>54</sup> See generally The Southern New Eng. Tel. Co. v. Dep't of Pub. Util. Control, CV-03-052-0409S, Judicial District of New Britain.

network, in fact less than 200 miles out of 3,196 miles.<sup>55</sup> That court proceeding resulted in the execution and entry of a Stipulated Settlement to which the Department is a party. The Stipulated Settlement provides that SBC (1) shall retain the as-built plans of the HFC network and (2) shall keep detailed records of all portions of the HFC network removed after the date of the Stipulated Settlement. Accordingly, SBC has a detailed inventory of approximately 94% of the HFC network.

With the use of the Arthur Anderson inventory, Gemini can perform its own field survey and report any discrepancies to SBC.

#### **SBC's Position**

SBC wants to require Gemini to go through a costly and time consuming preordering process for each HFC UNE ordered.

#### **28. Issue Presented - Ordering**

On what basis may Gemini place orders for HFC UNEs? (Section 9)

#### **Gemini's Position**

Gemini believes that it should be able to place an order covering all nodes in a given wire center serving area within a given town to ensure network continuity and ease of repair and upgrade.

#### **SBC's Position**

SBC proposes that Gemini request each node in a different order, with a limit on the number of nodes that can be ordered on any given day.

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<sup>55</sup> In court on April 15, 2003, at which the Assistant Attorney Generals representing the Department were present, along with Department staff, SBC stated that 3,000 out of 3,196 miles of HFC plant remained. Thus, at that time only approximately six percent of the network had been removed.

**29. Issue Presented - Activation**

How many nodes per day must SBC activate? (Section 10)

**Gemini's Position**

Gemini has requested that SBC activate a minimum of five nodes per day.

**SBC's Position**

SBC's position is that it will only activate one node per day, excluding Saturdays, Sundays and holidays. Based on this schedule, it will take six and one-half years to activate the entire remaining 1,600 nodes. This is unacceptable, considering the amount of time that has already been wasted while Gemini has been trying to gain access to the HFC UNEs.

**30. Issue Presented - Commingling**

SBC's prohibition on commingling is not consistent with the FCC's orders. (Section 16)

**Gemini's Position**

In the *Triennial Review Order*, the FCC eliminated the commingling restriction and "affirmatively permit[ted] requesting carriers to commingle UNEs and combinations of UNEs with services. . . and to require incumbent LECs to perform the necessary functions to effectuate such commingling upon request."<sup>56</sup> This determination survived the D.C. Circuit's remand.<sup>57</sup>

**SBC's Position**

SBC wants to prohibit Gemini from commingling.

**31. Issue Presented – Reservation of Rights**

Gemini will not agree to SBC's reservation of rights language. (Section 17)

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<sup>56</sup> TRO at ¶ 579.

<sup>57</sup> Gemini has not had an opportunity to review the new UNE rules released on February 4, 2005 concerning this issue.

### **Gemini's Position**

Gemini generally disagrees with SBC's position on its obligation to provide Gemini with access to the HFC UNEs. This section amounts to what Gemini views as SBC's attempt to force Gemini to waive certain rights Gemini has under state and federal law. Portions of this section also set forth SBC's interpretation of the *Triennial Review Order*, *USTA II*, *NARUC II* and the Department decisions in Docket Nos. 03-01-02 and 03-01-02RE01. Gemini does not agree that any of these documents stands for the propositions that SBC claims they stand for. Accordingly, Gemini cannot agree to the terms based upon SBC's interpretations of these documents and Gemini requests that the Department strike portions of this Section 17 as proposed by Gemini.

### **SBC's Position**

SBC did not provide Gemini with its rationale for insisting on this provision.

#### **C. Little UNE Issues (Exhibit 2)**

Gemini and SBC reached an impasse very early in their UNE negotiations. At the second face-to-face negotiation meeting, SBC announced that it would not make available as part of the UNE any part of Tier 3 of the abandoned HFC network other than contiguous coaxial cable, in operating condition, with no gaps. Gemini posited that, in the event a gap was located very close to the node, the entire coaxial run would be unavailable. SBC's response was, in essence, too bad. Gemini feels very strongly that SBC's position is simply to make as much of the HFC network unavailable as it can possibly get away with. If the Department accepts SBC's Little UNE proposal, not only will vast amounts of the remaining Tier 3 of the abandoned HFC network be stranded on the poles, but those portions of the HFC network that are available to Gemini will in all likelihood be unusable, as SBC's proposal does not permit Gemini to upgrade or repair nodes or even install power supplies to the network.



Notwithstanding the foregoing, Gemini attempted to negotiate a Little UNE proposal that it could live with in the event that the Department accepted SBC's Little UNE position rather than Gemini's Big UNE position. Unfortunately, even with the best of intentions, Gemini is not convinced that SBC's proposal is practically workable. Yet in the event that the Department agrees with SBC that the Little UNE is what the Department intended in its decisions in Docket Nos. 03-01-02 and 03-01-02RE01, Gemini requests the Department resolve the issues in this Section VI.C. After a thorough review of the arbitration award, Gemini will make a determination as to whether or not it can proceed with its plans to utilize the abandoned HFC network.

**1. Issue Presented – Legal Language**

SBC's legal interpretive language is not necessary to the Interconnection Agreement and should be stricken. (Sections 1.1, 1.2, 1.3)

**Gemini's Position**

Throughout both the Big UNE and Little UNE Appendices, SBC has included legal language concerning its reservation of rights to challenge the Department's orders unbundling the HFC network, and relating the unbundling order to the FCC's *Triennial Review Order* and other orders. Gemini believes that this language does not add anything to the Appendix, unnecessarily raises complicated legal questions that SBC is already pursuing through the courts and at the FCC, and attempts to provide a loophole through which SBC can obstruct or otherwise hamper Gemini's access to the HFC facilities.

Gemini does not believe that it should be compelled to adopt SBC's legal interpretation of anything, especially since Gemini disagrees with many of SBC's legal interpretations.

### **SBC's Position**

SBC did not provide Gemini with its rationale on this issue.

### **2. Issue Presented – Third Party Access Language**

SBC's language that it has not provided third party access to the HFC facilities is unnecessary. (Section 1.4)

### **Gemini's Position**

Gemini fundamentally disagrees with SBC's assertion that SBC has not previously provided access to the HFC facilities to a third party. Gemini believes that third party access was provided to SNET Personal Vision, Inc. Gemini has no information as to whether any other third party has been provided with access to any portion of the HFC network. Gemini does not believe that this language adds anything to the Interconnection Agreement and feels it is unnecessary and designed to bootstrap any arguments Gemini may seek to make in SBC's appeals of the Department's unbundling orders as to prior users and uses of the HFC network. Gemini does not object to the last sentence of this section providing for dispute resolution.

### **SBC's Position**

SBC has not provided Gemini with the rationale behind its inclusion of this language.

### **3. Issue Presented - Testing**

SBC does not need to perform "operational readiness testing through a separate testing environment that fully reflects the functionality and/or capabilities of the existing HFC facilities." (Section 1.5)

### **Gemini's Position**

Gemini has consistently sought unbundled access to the HFC network in "as is" condition as a "dark" facility. SBC has also consistently testified that it no longer has employees or

technicians familiar with or trained in HFC technology. Gemini is concerned that SBC will delay provision of the HFC network until such time as it performs its “operational readiness testing.” Additionally, SBC has testified that the HFC network is nonfunctional. Gemini has committed to upgrade and repair the network. Gemini is unaware of how SBC will make the HFC network “operationally ready” or test a nonfunctional network. Gemini believes that this is unnecessary and designed to further delay and hamper Gemini’s access to the network.

#### **SBC’s Position**

SBC did not provide Gemini with its rationale for including this language.

#### **4. Issue Presented – Node Housing vs. RT**

The appropriate descriptive term is “Node Housing” and not “HFC Remote Terminal.” (Section 1.6.7, and throughout the Appendix)

#### **Gemini’s Position**

Gemini believes it is wholly inappropriate for SBC to define this portion of the HFC network as a Remote Terminal. Collocation at a Remote Terminal is typically handled via CRTEE collocation, which is specifically designed for outside plant pedestals, cabinets and vaults used for accessing twisted copper pair distribution subloops. The Node Housing is a far smaller, specialized housing that holds the active optical transition node hardware, and has no applicability or analogy outside of the HFC network. Unlike Remote Terminals used in CRTEE, a Node Housing has no power supply or active ventilation, and does not occupy significant real estate, being entirely located within the relevant gain on the pole.

Gemini believes that SBC is seeking to transform the Node Housing into a Remote Terminal in order that SBC may charge exorbitant and inapplicable collocation fees, rather than have the Node Housing part of the HFC UNE and built into the cost of the UNE, as proposed by

Gemini. Additionally, Remote Terminals are specifically associated with Subloops, and Gemini believes that SBC is trying to shoehorn unbundling of the HFC into the category of a Subloop. While SBC's original HFC network did extend Fiber Tails to the wire center, Gemini is only seeking a Fiber Tail to an optical point of demarcation, typically a place in the outside plant where Gemini's fiber trunk will connect to SBC's abandoned HFC facilities. The Fiber Tail Gemini seeks to use will go to the wire center only in cases where the node is relatively close to the wire center and it thus becomes a convenient point of demarcation.

#### **SBC's Position**

SBC did not provide Gemini with its rationale for referring to the Node Housing as a Remote Terminal, other than that is what it believed it should be called.

#### **5. Issue Presented – Services**

Gemini may provide more than telecommunications services using the coaxial cable UNE. (Sections 2.1; 2.2)

#### **Gemini's Position**

Gemini believes that SBC's use of the term "telecommunications services" is unnecessarily restrictive. While these facilities are intended for the provision of telecommunications services, they may also be used for the provision of other services, including non-qualifying services. Gemini's service offerings will include voice telephone service.

#### **SBC's Position**

SBC did not provide Gemini with its position on this issue.

#### **6. Issue Presented – Use of Contractors**

SBC-approved contractors may perform maintenance and repair work. (Sections 2.5; 12.1; 12.2)

### **Gemini's Position**

The Department's decision in the reopened docket states:

Therefore, the Department will require the Telco and Gemini to negotiate, as part of their interconnection agreement, the applicable rates and charges that Gemini would incur when Company or Telco approved technicians repair, upgrade and maintain the HFC facilities that are located in the communications gain in the public rights of way.<sup>58</sup> In the opinion of the Department, contracts of this nature are consistent with the FRO and Verizon and should address those issues raised by the Telco relative to negative network reliability.<sup>59</sup>

SBC's position is that the Department meant that only SBC personnel may perform maintenance on the HFC facilities. Gemini believes that this an unnecessarily restrictive interpretation of the Department's ruling. The Department's ruling clearly left open the possibility that qualified contractors or subcontractors approved by SBC could perform the necessary maintenance work. This is a critical issue in light of the fact that SBC currently has no trained or qualified personnel and has not made any attempt to train or otherwise hire personnel to perform HFC maintenance work.

Throughout the underlying administrative proceedings concerning the HFC network, and during the Superior Court and FCC appeals, SBC has repeatedly stated that it has no personnel trained or qualified to maintain the HFC UNEs.<sup>60</sup> SBC also admittedly used contractors predominantly to perform maintenance on the HFC facilities and to remove customer drops and "dead plant" after announcing its intention to discontinue its use of the HFC network.<sup>61</sup>

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<sup>58</sup> In so doing, the Department believes that Telco network reliability and security should be preserved. See Verizon Communications, Inc. v. FCC, 535 U.S. 467, 536 (2002); FRO, 203.

<sup>59</sup> Decision, Docket No. 03-01-02RE01, Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Concerning the Unbundled Network Elements of the Southern New England Telephone Company, Aug. 25, 2004 at 4 (emphasis added) (footnote in original).

<sup>60</sup> See, e.g., Docket No. 03-01-02, Reply Comments of The Southern New England Telephone Company, Sept. 26, 2003 at 28 ("the Telco no longer has technicians trained to work on the coaxial facilities and has sold the equipment necessary for such testing, maintenance and repair.").

<sup>61</sup> See, e.g., Docket No. 03-01-02RE01, Tr. 6/14/04 at 268, 299-301.

SBC is in no position to maintain or repair the HFC network, especially since SBC has no incentive to adequately maintain, repair or upgrade the HFC facilities. SBC has not repaired or maintained the remaining coaxial portions of the HFC plant since its abandonment. SBC does not intend to utilize the HFC plant. Indeed, SBC has every incentive to delay and inadequately maintain the HFC facilities. Any agreement that permits only SBC personnel, and not qualified contractors, to work on the HFC facilities invites further delay while SBC attempts to hire and train personnel and foreshadows numerous additional regulatory proceedings wherein Gemini will have to seek Department orders to force SBC to provide adequate maintenance and repair.

The Department has encountered the issue of maintenance and repair of utility facilities on at least one prior occasion. In Docket No. 00-03-08, DPUC Review of The Connecticut Light and Power Company's Customer Service Policies and Charges, CL&P asserted that "the integrity of its distribution system would be compromised if it allows towns to install, connect, disconnect or otherwise maintain streetlights."<sup>62</sup> The Department rejected CL&P's contention.

The safety of the personnel that work on CL&P's distribution system is of utmost concern to the Department. Further, the integrity of CL&P's infrastructure must be maintained to assure system reliability. However, there are non-CL&P personnel that have met CL&P's qualifications for working on the system and are maintaining the distribution system at this time. With the exception of the physical connection to the secondary conductor, it does not appear that the type of work that is involved in the installation, removal and maintenance of streetlights would compromise CL&P's system. Therefore, qualified non-CL&P personnel can perform these tasks. Any contractor employed by the town to do this work would be required to obtain all necessary training, certification and to be properly insured before it could perform streetlight maintenance. In addition, the contractor would be required to demonstrate to CL&P's satisfaction that an individual is qualified to do this work. Therefore, the Department rejects CL&P's proposal that only Company personnel can perform streetlight maintenance work with the exception of connecting to the secondary conductor.<sup>63</sup>

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<sup>62</sup> Decision, Docket No. 00-03-08, DPUC Review of The Connecticut Light and Power Company's Customer Service Policies and Charges, July 11, 2001 at 9.

<sup>63</sup> Id.

Gemini has requested exactly what the Department ordered in the streetlight proceeding. There is also less concern with the reliability of SBC's presently abandoned HFC facilities than CL&P's distribution system. Only 20% of SBC's existing HFC plant comes into contact with any portion of the plant that SBC is still using. The Department has reached similar conclusions allowing the use of qualified contractors for maintenance and repair work within the existing gains of other utility companies.<sup>64</sup>

### **SBC's Position**

SBC believes that only its own employees may perform maintenance and repair work, despite the fact that it does not have any HFC-trained or qualified personnel on its staff.

### **7. Issue Presented – Applicable Standards**

Under what standards must HFC network elements be provided? (Section 2.8.1)

### **Gemini's Position**

Gemini believes that the HFC network elements should be provided in accordance with industry standards governing the performance, maintenance and repair of HFC. Gemini questions what technical publications or other written documents SBC references and objects to SBC's proposal to allow SBC to change those standards at any time in its sole discretion. Gemini notes that it has been more than ten years since SBC constructed the HFC network and that the standards under which SBC constructed and maintained the HFC network have changed since that time. Gemini further notes that SBC does not have standards for the operation, maintenance and repair of the HFC network since the HFC network has been abandoned by SBC.

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<sup>64</sup> See Decision, Docket No. 00-03-12, Application of the City of Groton for a Certificate of Public Convenience and Necessity, Apr. 11, 2001 at 4.

As provided in the Department's Decision in Docket No. 03-01-02RE01,<sup>65</sup> many companies are currently using HFC for the provision of telephony and other services. There are industry standards adhered to by those companies and other broadband service providers that are applicable to Gemini's use of the HFC network.

### **SBC's Position**

SBC questions the industry standards that Gemini refers to.

### **8. Issue Presented – Qualifying Services**

SBC may not dictate Qualifying Services conditions. (Section 2.9)

### **Gemini's Position**

Gemini objects to the imposition of qualifying services conditions by SBC. Gemini submits that the FCC and the Department, and not SBC, have the authority to dictate what constitutes a qualifying service. Gemini has committed in sworn testimony at hearing before the Department to abide by the law on this issue, as interpreted by the FCC and the Department. Gemini believes that, in accordance with the law as it currently stands, Gemini need only *offer* a qualifying service to all subscribers. If some of the services that Gemini offers are not qualifying, Gemini believes it can still provide these services to individual subscribers that may not be subscribing to qualifying services. Gemini prefers to define qualifying services in the context of applicable law, and not in SBC's limited historical view.

Gemini further believes that SBC's proposed definition of "common carrier" is unnecessary and needlessly restrictive.

Gemini objects to SBC's proposed ban on the provision of wholesale services. Gemini intends to provide wholesale services to Internet Service Providers and other CLECs, so that the

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<sup>65</sup> Decision, Docket No. 03-01-02RE01, Aug. 25, 2004 at 5.



HFC plant can be made available to the largest number of potential users. SBC has provided no basis or other justification for its exception.

### **SBC's Position**

SBC believes that Gemini must provide a qualifying to each and every residential or business end-user being provided service over the HFC UNE.

### **9. Issue Presented - OSS**

SBC must consult with Gemini before developing expensive and potentially needless OSS or other processes. (Section 2.10)

### **Gemini's Position**

Consistent with the Department's Decision,<sup>66</sup> Gemini believes that the ordering process can be easily accomplished manually and does not believe special OSS platforms need to be developed. Gemini requests that SBC consult with Gemini prior to the development of any OSS or processes. Gemini fears that this "catch all" provision may be used as a way to impose exorbitant and unnecessary costs on Gemini for use of the HFC UNEs.

### **SBC's Position**

SBC's position is that this is a "catch-all" provision for various HFC unbundling processes, all of which have yet to be determined.

### **10. Issue Presented – Tariffed Services**

Gemini should have the right to purchase coaxial cable facilities from tariff. (Section 2.12)

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<sup>66</sup> Decision, 03-01-02, Dec. 17, 2003 at 45

### **Gemini's Position**

SBC is required to file tariffs to ensure the availability of UNEs to all requesting carriers upon reasonable, nondiscriminatory rates and terms. Gemini does not know why SBC is trying to prevent access to these UNEs through its tariff or otherwise avoid its obligation to provide services through tariff, especially since SBC's counsel stressed the importance of tariffing these services during the hearing in Docket No. 03-01-02RE01.

### **SBC's Position**

SBC does not want Gemini to be able to purchase these services from tariff.

#### **11. Issue Presented – Repair and Replacement**

SBC must replace or repair missing or defective HFC components. (Section 3.2; 3.4)

### **Gemini's Position**

Gemini has consistently maintained that it desires access to the HFC network “as is” and “where is.” Gemini has further committed to repair and upgrade the abandoned HFC network facilities in order to make them usable. On the other hand, SBC has consistently asserted that it will not allow Gemini to repair or upgrade the HFC network and that all work on the HFC network must be performed by SBC technicians.<sup>67</sup>

While Gemini believes that qualified contractors should be permitted to upgrade, repair and maintain the HFC network as previously discussed, in the event that the Department determines that only SBC may upgrade, repair and maintain the HFC network, SBC must be required to actually perform the work. As proposed by SBC, Section 3.2 would excuse SBC from upgrading, maintaining and repairing the HFC network, thus rendering the unbundled facilities useless.

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<sup>67</sup> Gemini addressed this issue earlier in this Petition.

SBC also defines the available plant as ending at the first gap in the contiguous coaxial cable, and states that it will not repair or replace any gaps. Based on Gemini's knowledge and belief, this provision will strand much of the existing plant. Gemini believes that gaps in the coaxial cable plant must be filled so that the entire coaxial facility can be utilized. Gemini has offered to perform this replacement itself, at its own expense, thus leaving SBC with a complete, end-to-end usable facility when Gemini is done leasing it. Gemini further believes that SBC's proposal conflicts with SBC's obligations pursuant to the Stipulation.<sup>68</sup>

SBC also desires that all repairs be solely at Gemini's expense. While Gemini has committed to bearing the expense for repairing the HFC network, Gemini believes a more equitable pricing methodology would be a base pricing model that includes credit for sections of the HFC plant that require repair, which Gemini could then repair.

### **SBC's Position**

SBC states that it will not repair or replace missing or defective components.

### **12. Issue Presented – Bridging Gaps**

If repairs or replacements bridge an existing gap within the existing HFC plant, the plant on both sides of the gap must be made available and included as part of the UNE. (Section 3.4.2)

### **Gemini's Position**

Gemini believes that in order to give effect to the intent of the Department's unbundling orders and maximize the use of the abandoned HFC network that is currently occupying valuable pole space, Gemini should be able to access all of the HFC network. Gemini believes that there is no rational basis for excluding and stranding large portions of otherwise usable plant, except to prevent competitive use of that plant.

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<sup>68</sup> Stipulated Settlement, SNET v. DPUC, et al., CV-03-0520409-S, Apr. 15, 2003 (attached hereto as Exhibit D).

Additionally, Gemini believes that, for any plant repaired or replaced by Gemini, Gemini should pay a reduced monthly recurring charge. The pricing for these components should recognize the incomplete and unusable plant and such incomplete and unusable plant should not be billed at the same rates as complete, usable plant that requires no repairs by Gemini.

#### **SBC's Position**

SBC has provided no rationale for its desire to exempt facilities existing past a gap in the coaxial cable from use by Gemini.

#### **13. Issue Presented – Stipulation (Exhibit D)**

SBC must comply with the Stipulation. (Sections 3.5.1.2; 3.5.2.4; 3.5.3.3)

#### **Gemini's Position**

Gemini submits that SBC must comply with the terms of the Stipulation that mandate that SBC replace those portions of the coaxial cable that it removed after the effective date of the Stipulation, irrespective of whether or not Gemini has placed an order for use of those facilities. SBC has no ability or discretion with respect to this issue, as per the terms of the Stipulation.

#### **SBC's Position**

SBC has provided no support or rationale from its deviation from the explicit terms of the Stipulation.

#### **14. Issue Presented – Access to Optronics**

Gemini should not be limited in the methods by which it can access optronics. (Section 3.5.1)

#### **Gemini's Position**

SBC has proposed three options for accessing the node optronics and states that Gemini must pick only one to use and that the two other options not selected by Gemini will be deleted

from the Appendix and unavailable. Gemini sees no reason why all three options should not remain available so that Gemini may make a determination on a case-by-case basis. Since SBC is obviously capable of accommodating all three options, Gemini sees no rational reason for the proposed limitation.

### **SBC's Position**

SBC states that only one option will be made available.

#### **15. Issue Presented – CCF RT**

Existing collocation rates should not be applied to the CCF RT. (Sections 3.5.1.1; 3.5.1.2)

### **Gemini's Position**

Gemini objects to SBC characterizing the CCF RT (the Node Housing) as “mandated shared space.” Gemini believes that the terminology “mandated shared space” is appropriate for shared cabinets used in ordinary copper-loop outside plant collocation. However, the CCF RT associated with the HFC plant is dedicated space, as no other carrier makes use of the facilities inside it.

Gemini also objects to the application of existing collocation rates to the CCF RT. Existing collocation rates were designed for an entirely different network architecture with an entirely different cost basis, which is far costlier than the CCF RT. Gemini agrees that a monthly recurring rate for use of the CCF RT is appropriate, but believes that such rate should be based on the unique costs associated with this particular element.

#### **16. Issue Presented – Connection of Drop Wires**

Who may connect Gemini-owned drop wires to SBC-owned terminating tap ports?  
(Section 3.5.3; 4.11.1; 4.12.3; 5.1)

### **Gemini's Position**

Gemini believes that duly qualified contractors or other personnel should be permitted to connect Gemini-owned drop wires to SBC-owned terminating tap ports (the point at which the subscriber drop gains access to the coaxial cable). The connection to the terminating tap port is a simple coaxial connector, requiring no special skill to connect. Under SBC's proposal that only SBC technicians connect the drop wire to the terminating tap port, Gemini would have to install the drop wire, hang it on the pole untested, and then place a service order to SBC for a truck roll for the sole purpose of plugging a coaxial cable into a socket. Such a proposal needlessly delays service installations and makes diagnostics unnecessarily more difficult.

Furthermore, Gemini may need to test signal level at the tap port before making a connection to a drop. Such testing is not possible under SBC's proposal.

### **SBC's Position**

SBC wants to make all connections to the abandoned HFC facilities itself.

#### **17. Issue Presented – Maintenance and Repair Costs**

Gemini should not be billed separately for maintenance and repair. (Section 3.6; 3.8.2)

### **Gemini's Position**

SBC's proposal states that Gemini will be directly billed for all repairs. Industry standards dictate that UNEs are maintained by the ILEC and the costs associated with such maintenance are rolled into the monthly recurring charge for use of those UNEs. In the event that Gemini performs any maintenance or repair work on the UNEs, or directly pays a qualified contractor for such maintenance or repairs, Gemini should receive an appropriate credit off of the monthly recurring charge.

### **SBC's Position**

SBC wants to bill Gemini for all repair work in addition to the monthly recurring charge.

#### **18. Issue Presented – Power Supplies**

May Gemini use existing power supplies and where must new ones be placed? (Section 3.7.1.2; 7.1 re: placement of facilities in same gain)

### **Gemini's Position**

Gemini initially requested that it be able to utilize existing power supplies where they exist, but SBC refused. Gemini then requested that it be allowed to place new power supplies in the same gain and in the same space as the existing (or former) SBC power supplies. At first, SBC refused, but then relented, reserving its right to make “exceptions.” SBC also wants Gemini to compensate SBC for the removal of its old power supplies, to which Gemini objects. If the old power supplies remain and Gemini is not entitled to use them, the network itself becomes unusable. Thus, SBC is holding Gemini hostage for increased charges.

Additionally, as Gemini expands the network and services provided, Gemini requires the ability to insert power at additional locations as necessary. However, SBC, by requiring placement in accordance with the structures appendix, is prohibiting Gemini from placing those additional power supplies in the same gain, which would require Gemini to run a cable down the pole, something which SBC says it will not permit.

### **SBC's Position**

SBC declines to permit Gemini to use all existing power and wants Gemini to pay for the removal of SBC's old power supplies.

#### **19. Issue Presented – Terminating Tap Ports**

Gemini should be able to add and replace terminating tap ports. (Section 3.7.2)

### **Gemini's Position**

Gemini is requesting the addition of language that will allow it to add and replace terminating tap ports as required, in order to provide adequate service to customers along the route where there may not be sufficient taps currently in place.

### **SBC's Position**

SBC did not respond to Gemini's request to add and replace terminating tap ports.

#### **20. Issue Presented – Reverse Path Band**

SBC should not be able to dictate the reverse pathband. (Section 3.7.2.2.1)

### **Gemini's Position**

SBC specifies limiting the reverse pathband to 5-35 MHz. Gemini may wish to use a wider reverse pathband. To the extent that Gemini owns the nodes, and replaces amplifiers if necessary, this can be accomplished by the cable. Existing industry practice is to use 42 MHz for the highest upstream frequency, while higher split frequencies are available. SBC should not be able to limit the capability of the network based on standards that it employed ten years ago.

### **SBC's Position**

SBC specifies limiting the reverse pathband to 5-35 MHz.

#### **21. Issue Presented – Vendor Meets**

Vendor meets should not be required for all repairs. (Section 3.7.4.3)

### **Gemini's Position**

SBC proposes a vendor meet for all repairs, which will be exceedingly costly. Where Gemini or qualified contractors will be making repairs, vendor meets are unnecessary. Where SBC will be making repairs, the responsibility will be SBC's and therefore, if SBC desires a vendor meet it should be at no cost.



### **SBC's Position**

SBC proposes a vendor meet for all repairs.

### **22. Issue Presented – System Performance**

SBC should not dictate system performance based on ten year old specifications.

(Section 3.7.5)

### **Gemini's Position**

SBC proposes that RF levels be based on CCF design specification and as-builts. These are ten year old specifications that are unknown to Gemini and do not necessarily reflect current industry practice. Gemini proposes that system performance be in accordance with generally accepted broadband industry standards, which will be more maintainable and interoperable with available equipment.

### **SBC's Position**

SBC proposes RF levels based on historical system design.

### **23. Issue Presented – Overlapping**

Gemini should be able to overlap its facilities where necessary. (Section 3.9)

### **Gemini's Position**

Gemini requests that it be permitted to overlap its fiber to SBC's facilities, much as SBC currently does, in places where poles are congested. Gemini's ability to reach access points with its own trunk fiber is impaired by the congestion on the poles. Overlapping becomes especially critical in this Little UNE model, where Gemini will need to construct more of its own facilities.

Although overlapping has not been mandated anywhere in the United States, it has been strongly encouraged on a routine basis by both the FCC and the Department. In its Report and Order governing pole attachments, the FCC stated:

The record does not indicate that third party overlashing adds any more burden to the pole than overlashing one's own pole attachment. We do not believe that third party overlashing disadvantages pole owners in either receiving fair compensation or in being able to ensure the integrity of the pole. Facilitating access to the pole is a tangible demonstration of enhancing competitive opportunities in communications. Allowing third party overlashing will also reduce construction disruption (and the expense associated therewith) which would otherwise likely take place by third parties installing new poles and separate attachments. Accordingly, we will allow third party overlashing subject to the same safety, reliability and engineering constraints that apply to overlashing one's own pole attachment. Concerns that third party overlashing will increase the burden on the pole can be addressed by compliance with generally accepted engineering practices.<sup>69</sup>

The FCC's position on overlashing is that "[o]verlashing capability continues to be a facet of a pro-competitive market because it maximizes the usable capacity on a pole."<sup>70</sup>

The FCC later clarified and reaffirmed its position on overlashing, stating that it "declared our continued approval of, and support for, third party overlashing, subject to the same safety, reliability, and engineering constraints that apply to overlashing one's own pole attachment."<sup>71</sup> "The commission has recognized overlashing as a legitimate and desirable practice, especially because utility poles are often regarded as essential facilities."<sup>72</sup>

The Department has also recognized the benefit of, and encouraged overlashing.<sup>73</sup> The Department's findings with respect to overlashing were made at the specific request of SBC.

Furthermore, the Telco requests that the Department recognize and require that where structurally feasible, the overlashing of lines or cables be implemented to

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<sup>69</sup> Report and Order, CS Docket No. 97-151, In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, 13 FCC Rcd 6777 (Feb. 6, 1998) at ¶ 68, aff'd, Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co., 534 U.S. 327 (2002).

<sup>70</sup> Id. at ¶ 60.

<sup>71</sup> Consolidated Partial Order on Reconsideration, FCC 01-170, In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments; In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, 16 FCC Rcd 12103 (May 22, 2001) at ¶ 73.

<sup>72</sup> Id. at n.254 (citations omitted).

<sup>73</sup> Decision, Docket No. 99-03-25RE01, Application of The Southern New England Telephone Company for a Declaratory Ruling Regarding Municipal Use of Poles and Conduits – Municipal Gain, May 17, 2000 at 3.

accommodate additional cables and that such a construction method constitutes one attachment. Lastly, the Telco indicates that it is working with Manchester and has recommended the overlashing of cables as a mean of eliminating improper spacing on poles. In the opinion of the Telco, as long as the integrity of the pole is not compromised, the overlashing of numerous lines is acceptable as new or additional space on the pole is not utilized. Telco Written exceptions, pp. 4, 7, 10 and 11.<sup>74</sup>

In the Manchester proceeding cited above, overlashing did not create any maintenance issues or technical concerns for SBC. SBC also has a pole attachment price contained in its tariffs and pole attachment agreements for overlashing entities. SBC cannot be permitted to speak from both sides of its mouth. What is technically and operationally prudent for competitors, according to SBC, must be considered technically and operationally prudent for SBC.

#### **SBC's Position**

SBC's position is that it does not permit overlashing.

#### **24. Issue Presented – Collocation**

Traditional collocation policies are inapplicable. (Section 4.1)

#### **Gemini's Position**

Gemini objects to applying copper loop plant-based collocation to the HFC plant, especially where no other parties will be accessing the facilities. Gemini requests that HFC-specific access arrangements be applied instead.

#### **SBC's Position**

SBC maintains that standard collocation is applicable.

#### **25. Issue Presented – Rights-of-Way**

What rights-of-way must Gemini obtain? (Section 4.6)

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<sup>74</sup> Id. (citations in original).

### **Gemini's Position**

Gemini recognizes that certain rights-of-way issues may occur when Gemini constructs its own facilities. However, Gemini's obligations for the use of SBC's HFC UNE should not exceed those of other CLECs using UNEs. Gemini presumes that SBC's existing HFC plant has adequate rights-of-way.

### **SBC's Position**

SBC believes it is Gemini's responsibility to ensure adequate rights-of-way.

#### **26. Issue Presented – Time Frames**

What are the appropriate time frames for completing certain actions? (Sections 4.3; 4.8)

### **Gemini's Position**

SBC proposes to provide Gemini with a response to an application for access to facilities within 30 days. Gemini believes that 30 days is too long and a response should be provided within 20 days maximum. SBC has also proposed a 90 day interval for constructing an access arrangement. Gemini believes that this is too long, especially since the plant is already on the poles, and proposes a 60 day interval at maximum.

### **SBC's Position**

SBC proposes 30 days to respond to an application and 90 days to construct an access arrangement.

#### **27. Issue Presented – Power Supplies**

Pursuant to what standards should power be provisioned? (Section 6.1)

### **Gemini's Position**

In addition to Gemini's earlier arguments that power supplies should be included as part of the UNE, Gemini believes that power should be provisioned consistent with industry standards. SBC cites its own specifications, which are unknown to Gemini.

### **SBC's Position**

SBC cites its own power specifications, which are unknown to Gemini.

### **28. Issue Presented – Defective Components**

Defective components should be identified as available. (Section 8.1.1)

### **Gemini's Position**

SBC states that "available CCF do not include defective components." Since Gemini has never been provided with an inventory of the HFC plant, if the plant is defective, SBC will simply respond "unavailable" and Gemini will have no way of knowing whether the components exist, but are damaged, or whether the components do not exist at all. This could potentially strand a great portion of the network, given that it has not been maintained in years. Gemini requests that this sentence be deleted from Section 8.1.1.

### **SBC's Position**

SBC maintains that defective components are unavailable.

### **29. Issue Presented – Inventory**

Field surveys should be based on the existing Arthur Anderson inventory. (Section 8)

### **Gemini's Position**

Gemini believes that SBC's preordering process is unnecessary and costly. SBC maintains enough relevant information with respect to the HFC network to suit both parties' needs and to obviate the need for any costly preordering process.

In its compliance filing for Order No. 1, dated May 1, 2001, in the SPV Franchise Relinquishment docket,<sup>75</sup> SBC stated as follows:

The Companies have engaged consultants from the firm Arthur Andersen (“AA”) to assist in estimating the value of the assets contained in Major Asset Category 1, which is comprised of all the associated components in the coaxial portion of the HFC Network. Telco provided AA a list of components of the entire HFC network and their associated original purchase and installation costs. Telco also identified separately the components of the coaxial portion of the HFC network that may be available for sale, lease or tariff and those components of the HFC network that will be re-used by SNET and are not available for disposition.<sup>76</sup>

Thus, a complete inventory of the existing plant was available as of May 1, 2001.

Although SBC has claimed that the 2001 inventory is incomplete and unreliable, as SBC has systematically removed and disposed of portions of the HFC network, during SBC’s appeal of the Department’s order that it cease removing portions of the HFC network pending the outcome of Docket No. 03-01-02,<sup>77</sup> SBC stated that it had actually removed very little of the network, in fact less than 200 miles out of 3,196 miles.<sup>78</sup> That court proceeding resulted in the execution and entry of the Stipulation to which the Department is a party. The Stipulation provides that SBC (1) shall retain the as-built plans of the HFC network and (2) shall keep detailed records of all portions of the HFC network removed after the date of the Stipulation. Accordingly, SBC has a detailed inventory of approximately 94% of the HFC network.

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<sup>75</sup> Docket No. 00-08-14, Application of Southern New England Telecommunications Corporation and SNET Personal Vision, Inc. to Relinquish SNET Personal Vision, Inc.’s Certificate of Public Convenience and Necessity.

<sup>76</sup> SBC Compliance Filing, Order No. 1, Docket No. 00-08-14, Application of Southern New England Telecommunications Corporation and SNET Personal Vision, Inc. to Relinquish SNET Personal Vision Inc.’s Certificate of Public Convenience and Necessity, May 1, 2001 at 2 (emphasis added).

<sup>77</sup> See generally The Southern New Eng. Tel. Co. v. Dep’t of Pub. Util. Control, CV-03-052-0409S, Judicial District of New Britain.

<sup>78</sup> In court on April 15, 2003, at which the Assistant Attorney Generals representing the Department were present, along with Department staff, SBC stated that 3,000 out of 3,196 miles of HFC plant remained. Thus, at that time only approximately six percent of the network had been removed.

With the use of the Arthur Anderson inventory, Gemini can perform its own field survey and report any discrepancies to SBC.

#### **SBC's Position**

SBC wants to require Gemini to go through a costly and time consuming preordering process for each HFC UNE ordered.

#### **30. Issue Presented - Ordering**

On what basis may Gemini place orders for HFC UNEs? (Section 9)

#### **Gemini's Position**

Gemini believes that it should be able to place an order covering all nodes in a given wire center serving area within a given town to ensure network continuity and ease of repair and upgrade.

#### **SBC's Position**

SBC proposes that Gemini request each node in a different order, with a limit on the number of nodes that can be ordered on any given day.

#### **31. Issue Presented - Activation**

How many nodes per day must SBC activate? (Section 10)

#### **Gemini's Position**

Gemini has requested that SBC activate a minimum of five nodes per day.

#### **SBC's Position**

SBC's position is that it will only activate one node per day, excluding Saturdays, Sundays and holidays. Based on this schedule, it will take six and one-half years to activate the entire remaining 1,600 nodes. This is unacceptable, considering the amount of time that has already been wasted while Gemini has been trying to gain access to the HFC UNEs.

**32. Issue Presented – Service Interruptions**

SBC should provide credit for service interruptions. (Section 12.3)

**Gemini's Position**

Gemini believes it is entitled to credits for service interruptions resulting from SBC's tests and adjustments.

**SBC's Position**

SBC proposes that no credits will be given for service interruptions.

**33. Issue Presented – Mutual Non-Impairment**

Non-impairment language should be reciprocal. (Section 12.4)

**Gemini's Position**

Gemini agrees that it should not materially impair service that SBC provides to its customers, as requested; however, Gemini seeks reciprocity.

**SBC's Position**

SBC did not respond to Gemini's request.

**34. Issue Presented – Payment for Trouble Calls**

Who should pay for a trouble call? (Section 12.8)

**Gemini's Position**

Gemini believes that the party whose facilities are causing the trouble should pay for the trouble call.

**SBC's Position**

SBC proposes that Gemini pay for SBC's technicians when there is a trouble call determined to not be caused by SBC facilities.



**35. Issue Presented - Commingling**

SBC's prohibition on commingling is not consistent with the FCC's orders. (Section 16)

**Gemini's Position**

In the *Triennial Review Order*, the FCC eliminated the commingling restriction and “affirmatively permit[ted] requesting carriers to commingle UNEs and combinations of UNEs with services. . . and to require incumbent LECs to perform the necessary functions to effectuate such commingling upon request.”<sup>79</sup> This determination survived the D.C. Circuit's remand.

**SBC's Position**

SBC's proposal prohibits commingling.

**36. Issue Presented – Reservation of Rights**

Gemini will not agree to SBC's reservation of rights language. (Section 17).

**Gemini's Position**

Gemini generally disagrees with SBC's position on SBC's obligation to provide Gemini with access to the HFC UNEs. This section amounts to what Gemini views as SBC's attempt to force Gemini to waive certain rights Gemini has under state and federal law. Portions of this section also set forth SBC's interpretation of the *Triennial Review Order*, *USTA II*, *NARUC II* and the Department decisions in Docket Nos. 03-01-02 and 03-01-02RE01. Gemini does not agree that any of these documents stands for the propositions that SBC claims they stand for. Accordingly, Gemini cannot agree to the terms based upon SBC's interpretations of these documents and Gemini requests that the Department strike portions of this Section 17 as proposed by Gemini.

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<sup>79</sup> TRO at ¶ 579.

### **SBC's Position**

SBC did not provide Gemini with its rationale for insisting on this provision.

#### **D. 13-STATE LANGUAGE**

At the outset of negotiations, SBC provided Gemini with its 13-state generic interconnection agreement appendices. SBC stated that all negotiations begin from the generic agreement. Gemini indicated that, at this time, it was not interested in negotiating an interconnection agreement for any state other than Connecticut. However, SBC indicated that it always arbitrates the 13-state language.

##### **1. Issue Presented – 13-State Language**

Must these Appendices contain references for the entire SBC 13-state region?

### **Gemini's Position**

Gemini is negotiating this entire Interconnection Agreement in order that it may provide service utilizing portions of SBC's abandoned HFC network. SBC's abandoned HFC network is unique in the nation. Many of the terms and conditions contained in the Appendices flow from the terms and conditions contained in the HFC Appendix. Thus, this entire Interconnection Agreement is dependent on the unique circumstances associated with the abandoned HFC network. Gemini does not believe it is appropriate to reference other SBC territories. Gemini is not interested in negotiating an Interconnection Agreement for any state other than Connecticut and believes that provisions not relevant to Connecticut needlessly complicate the documents.

Additionally, although Gemini is primarily interested in accessing the abandoned HFC network, as a CLEC, Gemini will encounter other, typical CLEC issues. Unfortunately, since

there is no longer a “pick and choose” rule available to Gemini,<sup>80</sup> Gemini cannot opt in to another interconnection agreement in part and must therefore negotiate every appendix.

### **SBC’s Position**

During the course of negotiations, SBC advised Gemini that it always arbitrates the 13-state language.

#### **E. General Terms and Conditions (Exhibit 3)**

SBC provided Gemini with its generic 13-state General Terms and Conditions Appendix. Gemini blacklined the Appendix, providing SBC with its comments and concerns on December 6, 2004. As of the date of this filing, SBC has not responded to Gemini’s comments or concerns or provided Gemini with any comments on Gemini’s mark-up.

#### **1. Issue Presented - Declassification**

SBC’s declassification language is unnecessary. (Section 1.1.32)

### **Gemini’s Position**

Since the HFC network is unique in the nation, it does not fall neatly into one of the categories of UNEs specifically addressed in Section 251(c)(3) of the Act or the FCC’s UNE rules. The Department adequately analyzed this issue in its final decision in Docket No. 03-01-02. Thus, Gemini does not believe it is appropriate to include standard declassification language tied to Section 251(c)(1) and the ongoing legal challenges associated with the FCC’s UNE rules. During the course of negotiations, SBC agreed to remove declassification language from the Draft HFC Appendix. However, SBC did not respond to any of Gemini’s comments or concerns as of the date of filing of this Petition with respect to this Appendix.

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<sup>80</sup> The FCC eliminated pick and choose in Second Report and Order, CC Docket No. 01-338, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 19 FCC Rcd 13494 (Jul. 8, 2004).

SBC's proposed declassification language, if allowed, would permit SBC to refuse to provide Gemini with necessary UNEs based on SBC's own self-serving, unilateral interpretation of federal law. Gemini requests that the Department reject this attempt by SBC to determine for itself how a change of law operates, especially since SBC's actions concerning the HFC UNEs indicate it already considers the HFC UNEs to be "declassified."

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

## **2. Issue Presented – Definition of Lawful**

The definition of "lawful" should include Connecticut law and lawful and effective rules and orders of the Department. (Sections 1.1.63; 2.11.3; 21.1; 22.1)

### **Gemini's Position**

As Gemini has argued throughout the underlying administrative proceedings that led to this negotiation and arbitration, the Department has independent state law authority governing unbundling and interconnection.<sup>81</sup> In fact, the uniqueness of the HFC network and the Department's decisions highlight the necessity of a reference to state law and Department orders, rather than just federal law.

Gemini views SBC's characterization of "lawful" UNEs as an attempt to hamstring Gemini into waiving certain of its rights to access to UNEs under state and federal law. Gemini further believes that SBC's definition of lawful is incomplete as it completely ignores state law and the Department's orders. As an alternative to amending the definition of "lawful" as

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<sup>81</sup> The Department recognized its own independent state law authority to unbundle in its Decision, Docket No. 03-01-02, Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding the Unbundled Network Elements of the Southern New England Telephone Company, Dec. 17, 2003.

proposed by Gemini, the Department may consider striking the term altogether from all Appendices. The term is not a term defined by federal or state law, or any FCC or Department order. Elimination of the word “lawful” may obviate the need for future litigation.

### **SBC’s Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini’s mark-up of this Appendix.

### **3. Issue Presented - Severability**

Gemini seeks resolution of the conflicting language concerning severability in Section 2.8.1.

### **Gemini’s Position**

The first two sentences of this Section contain standard language indicating that the Interconnection Agreement is severable and that, if necessary to effect the intent of the parties, the parties shall negotiate new language to replace any unenforceable language. However, the third sentence of Section 2.8.1 states that the Interconnection Agreement is nonseverable. Gemini believes that Connecticut consumers will be better served if the Interconnection Agreement is severable and requests that the last sentence of Section 2.8.1 be stricken.

### **SBC’s Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini’s mark-up of this Appendix.

### **4. Issue Presented – Non-Voluntary Provisions**

Inclusion of the “non-voluntary provisions” language is unnecessary. (Section 2.10)

### **Gemini's Position**

Gemini believes that inclusion of Sections 2.10.1 and 2.10.2 is unnecessary and does not add anything to the Interconnection Agreement. Section 2.10.1 provides that, in the event that any SBC-designated non-voluntary arrangement arbitrated by the Department is modified by judicial order, the parties have 60 days to negotiate appropriate modifications. Such a provision works only to the detriment of Gemini, as SBC clearly considers the entire Interconnection Agreement negotiation process with Gemini to be non-voluntary. In the event of a judicial order or other change in law, SBC may invoke the relevant change in law provisions. Relying on the change of law provisions will also make the Agreement more equitable, as it allows not only SBC to take action to effect a change in the Agreement based on a change in law, but also Gemini.

Section 2.10.2 is inapplicable as the FCC has done away with the pick and choose rules.<sup>82</sup>

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

## **5. Issue Presented – Provisioning Date**

Gemini can not be forced to begin providing telephone exchange service within 180 days of executing the Interconnection Agreement. (Section 4.1)

### **Gemini's Position**

Gemini believes it is inappropriate for SBC to impose deadlines on competitive service providers for the initiation of services, especially in this instance. As the Department is aware, Gemini's provision of service is wholly dependent on the upgrade and repair of the abandoned

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<sup>82</sup> Second Report and Order, CC Docket No. 01-338, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carrier, 19 FCC Rcd 13494 (July 8, 2004).

HFC network. Certainly, Gemini believes it can quickly upgrade and repair the HFC network. However, SBC continues to assert that only SBC may perform such work and has offered no timeline or commitment as to how quickly it can perform such repairs. In fact, SBC does not even have a workforce in place or technicians trained to perform such work and has no definitive plans to hire or train any technicians.

Additionally, even assuming timely upgrade and repair of the HFC network, SBC has only offered to activate one UNE per business day in the HFC UNE Appendix. At that rate, it is inconceivable that Gemini will be able to provide service within 180 days of execution of this Agreement. Gemini requests that this Section 4.1 be stricken from the Interconnection Agreement.

#### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **6. Issue Presented - Assignment**

SBC should not be entitled to unreasonably withhold consent for assignment of this Interconnection Agreement or otherwise impose onerous assignment provisions. (Section 4.8.1.1; 4.8.1.2; 4.8.2; 4.8.3.2)

#### **Gemini's Position**

It is standard business practice to restrict the unreasonable withholding of consent for assignments of contracts. Gemini requests that the language "which consent shall not be unreasonably withheld" be added to the end of the first sentence of this Section 4.8.1.1 and that the last two sentences of Section 4.8.1.2 be deleted. Additionally, SBC proposes to charge a record order charge for each end-user record in the event of a name change or company code

change, as it is not contemplated that Gemini will place orders or be billed through the carrier access billing system. Such a charge is onerous and unnecessary, especially since the number of end-users receiving service through the HFC will be of no consequence in the context of lease of the HFC UNEs. Gemini contemplates that SBC will have no knowledge of the number of end-users being served by Gemini over the HFC UNEs.<sup>83</sup> Such a charge may be more relevant to a twisted copper pair network, where each end-user is a separate copper pair that needs a separate billing record. Such is not the case with the HFC UNEs.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

### **7. Issue Presented - OSS**

Gemini should not be required to use only SBC-provided OSS. (Section 4.12)

### **Gemini's Position**

As articulated at hearing, Gemini believes that a fully mechanized, complicated OSS is not necessary in the context of ordering the HFC UNEs. Gemini believes that appropriate ordering, processing and billing can be accomplished manually or through a simple spreadsheet that Gemini is willing to provide, based on the number of miles of HFC UNE being ordered, or on a wire center by wire center basis. Further, SBC testified that it does not have any OSS for the HFC. SBC did not propose any specific OSS during the course of these negotiations. Accordingly, SBC is in no position to mandate that Gemini use that which does not exist. Gemini requests that this Section 4.12 be stricken from the Interconnection Agreement.

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<sup>83</sup> Otherwise, Gemini submits that SBC will have an unfair competitive advantage.



### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **8. Issue Presented - Escrow**

Gemini should not be forced to tie up funds in an escrow account during the pendency of a billing dispute. (Sections 8.4; 8.5; 8.6; 8.7; 9.3.3; 9.3.4; 10.4.1)

### **Gemini's Position**

Gemini is extremely concerned that inclusion of this provision will allow SBC to tie up substantial funds of a competitor with no appropriate basis. Gemini has engaged in past billing disputes with ILECs and it has taken an inordinate amount of time to get such disputes resolved. According to SBC's proposal, substantial funds of Gemini could be tied up in escrow during the pendency of such a dispute, with no recourse against SBC for dragging its feet to reach resolution.

In order to obtain a CLEC license in the State of Connecticut, Gemini underwent a thorough review by the Department of Gemini's financial suitability to operate in Connecticut. In the event that Gemini is unable or unwilling to live up to its financial obligations, SBC has recourse through the Department. Moreover, SBC is entitled to late payment penalties in the event that a dispute is resolved in its favor. These protections are more than adequate and obviate the need to tie up a CLEC's capital during the pendency of a dispute.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

**9. Issue Presented – Termination of Service**

SBC cannot terminate service to Gemini for failure to pay disputed charges. (Section 9.2; 10.4.1)

**Gemini's Position**

Gemini does not believe that SBC should be able to terminate service for failure to pay charges that are the subject of a good faith dispute. Gemini's position is consistent with SBC's retail tariffs and the Department's consumer protections. Gemini thus requests that the word "undisputed" be inserted in Section 9.2 as shown in Exhibit 3. Additionally, Gemini requests that the language in Section 10.4.1 that charges must be paid in order to be disputed be removed.

**SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

**10. Issue Presented – Disputed Bills**

How long after the appearance on a bill may a party dispute a bill? (Section 10.1.2; 10.4.1)

**Gemini's Position**

Gemini believes that the dispute resolution procedures and provisions concerning finality of disputes should be consistent wherever possible. Accordingly, Gemini suggests changing the 12 month period for disputing a charge on a bill contained in Section 10.1.2 to 24 months, to make it consistent with the time period for making a claim of dispute contained in Section 10.1.1. Gemini also requests that the last sentence of Section 10.4.1 be deleted in order to achieve the same consistency (Section 10.4.1 currently provides that all information to dispute a

bill must be provided within 29 days following the Bill Due Date or the right to dispute the charge is irrevocably waived).

#### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **11. Issue Presented – Arbitration Situs**

Hartford is the appropriate location for arbitration and personal jurisdiction. (Sections 10.7.1; 22.1)

#### **Gemini's Position**

Gemini requests that all references to other states be removed from this Section 10.7.1. Gemini also requests that the place of arbitration in Connecticut be changed from New Haven to Hartford. SBC has a substantial presence in Hartford and Gemini is headquartered in Hartford.

#### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **12. Issue Presented – Damages Limitation**

Gemini will not agree to SBC's onerous damages limitation language. (Sections 13.4; 13.5; 13.7; 13.8)

#### **Gemini's Position**

Gemini is unwilling to waive its right to consequential damages, especially in light of the anti-competitive conduct and stalling tactics employed by SBC in trying to prevent Gemini's access to the abandoned HFC network. Additionally, Gemini is unable to waive liability for damages on behalf of any end-user or other third party. Gemini does not agree that the language

in Section 13 was freely negotiated or that different language would raise the cost of SBC's provision of service as stated in Section 13.8. Gemini requests that Section 13.8 be stricken in its entirety.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

### **13. Issue Presented - Indemnification**

Gemini will not agree to SBC's indemnification language concerning vendor intellectual property. (Section 14.5.3)

### **Gemini's Position**

This proposed indemnification provision has the effect of unnecessarily increasing Gemini's costs. Further, Gemini never agrees to indemnification provisions in commercial arms-length contract negotiations. SBC is demanding indemnification simply because of its stronger bargaining position resulting from its dominant position in the Connecticut telephone market. Without indemnification, SBC still retains all of its rights against Gemini in the event of an intellectual property claim by a third party against SBC.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

### **14. Issue Presented - Subrogation**

Gemini will not agree to be subrogated to the right of recovery of SBC from third parties for damages. (Section 14.6)

### **Gemini's Position**

Gemini does not agree to be subrogated to SBC's right of recovery for any damages caused by third parties. SBC has provided no rationale for its unilaterally mandated preferential treatment.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

## **15. Issue Presented – Email Notices**

Whether Gemini can agree to accept notices via email. (Sections 17.1.4; 17.1.5.4)

### **Gemini's Position**

Gemini and SBC already communicate extensively by email and Gemini believes that delivery of notices via email is an efficient means of communication. Further, email allows request and receipt of a delivery confirmation that the message has been read.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

## **16. Issue Presented – Notice of Intent to Disclose**

The parties should provide notice of their respective intentions to disclose confidential information. (Section 20.2.7)

### **Gemini's Position**

Gemini believes that a party about to disclose confidential information in response to applicable law, regulation or court order should provide notice of the impending disclosure to the

non-disclosing party in order that the non-disclosing party may have an opportunity to challenge such law, regulation or order or otherwise seek an appropriate protective order.

#### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **17. Issue Presented – Intervening Law**

Specific instances of “intervening law” should not be included. (Section 21.1)

#### **Gemini's Position**

Given the state of uncertainty of current telecommunications law, Gemini believes it is inappropriate to reserve certain “intervening law” rights by citing specific, unilaterally picked cases and appeals. A general reservation of rights and a reference to applicable law should be sufficient for both parties, who have each demonstrated that they are capable of exercising their rights under state and federal law.

#### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **Issue Presented**

#### **18. Issue Presented – Change of Law**

SBC's Change of Law provision is impractical. (Section 21)

#### **Gemini's Position**

SBC provides that, in the event of a change of law, the parties will have 60 days to negotiate a new agreement on the provision in question will automatically be invalidated. This is impractical, as Gemini has not been able to get SBC to respond to its negotiations on these

Appendices in more than 120 days. As an incentive for SBC to negotiate, the provision should remain in place until a new provision is agreed on.

**SBC's Position**

SBC did not provide Gemini with comments on or otherwise respond to Gemini's mark-up of this Appendix.

**19. Issue Presented – Third-Party Beneficiaries**

SBC should not be able to exclude third-party beneficiaries. (Section 28.1)

**Gemini's Position**

As Gemini intends to serve both wholesale and retail customers, Gemini believes its customers should be able to hold SBC responsible for any conduct which lowers the quality of the HFC network. Liability to multiple parties may be SBC's only incentive to properly maintain the network.

**SBC's Position**

SBC did not provide Gemini with comments on or otherwise respond to Gemini's mark-up of this Appendix.

**20. Issue Presented – Texas taxes**

Gemini is not subject to Texas taxes and fees. (Section 33.2)

**Gemini's Position**

Gemini is not subject to Texas taxes and fees and therefore requests that Section 33.2 be stricken in its entirety.

**SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

**21. Issue Presented – Service to End-Users**

The language concerning SBC's provision of service to end-users is inapplicable.  
(Section 38.4).

**Gemini's Position**

This provision may be applicable in the twisted copper pair universe where each end-user is served via a twisted copper pair. However, Gemini is negotiating an Interconnection Agreement for access to miles of coaxial plant and associated facilities. SBC does not, nor is it conceivable that it will, provide access to miles of coaxial plant and associated facilities directly to end-users. Accordingly, Gemini requests that Section 38.4 be stricken in its entirety.

**SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

**22. Issue Presented – Future UNEs**

SBC must provide future UNEs not contemplated by this Interconnection Agreement.  
(Section 42.1)

**Gemini's Position**

Gemini is negotiating this Interconnection Agreement for access to SBC's abandoned HFC network. Although not currently contemplated, Gemini may desire to lease future UNEs unrelated to the HFC network or future UNEs named later in the Act. Gemini believes that this language serves no purpose other than to prevent or delay Gemini's access to future UNEs. Gemini requests that the last sentence of Section 42.1 be stricken from the Agreement.



### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **23. Issue Presented – True-Ups**

Amendments and modifications should require true-ups. (Section 43.1)

### **Gemini's Position**

Due to routine regulatory lag, in addition to the numerous delays Gemini has experienced in attempting to get an Agreement negotiated with SBC, Gemini does not believe it is fair to withhold refunds, true-ups and retroactive credits.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **24. Issue Presented – 911 for Data Providers**

The 911 and E911 provisions applicable only to data providers are inapplicable. (Section 44.6.1.2)

### **Gemini's Position**

Gemini intends to provide voice grade service pursuant to its license and will not be a data-only provider. Thus, this section is inapplicable and Gemini requests that this Section 44.6.1.2 be stricken in its entirety.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

**25. Issue Presented – SBC Access to Gemini Network**

Gemini cannot be required to provide access to its network elements to SBC. (Section 44.6.10)

**Gemini's Position**

Gemini is not an ILEC and, as a CLEC, is not required pursuant to the Act, or any provision of state or federal law to provide access to its network elements to any other party. Nevertheless, Gemini has committed to providing access to its network to any requesting carrier, including SBC. Such access will be provided in accordance with commercially negotiated arrangements that take into consideration the quality and functionality of Gemini's network elements. Since Gemini's network is substantially more sophisticated, has been adequately maintained and repaired and is functional, Gemini cannot provide access to its network to SBC on the same terms and conditions as Gemini is being provided access to SBC's abandoned, non-functional HFC network. Gemini requests that the last sentence of Section 44.6.10.1 be stricken.

**SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

**F. Appendix ITR (Interconnection Trunking Requirements) (Exhibit 4)**

SBC provided Gemini with its generic 13-state Appendix ITR. Gemini blacklined the Appendix, providing SBC with its comments and concerns first on December 8, 2004, and then again as revised on January 3, 2005. As of the date of this filing, SBC has not responded to Gemini's comments or concerns or provided Gemini with any comments on Gemini's mark-up.

**1. Issue Presented – Local Trunking**

SBC should be required to use two-way local trunking. (Sections 2.6; 3.4; 4.4)

### **Gemini's Position**

Unlike almost all other ILECs, including SBC in its other 12 states, SBC Connecticut stubbornly clings to accepting only one-way local trunking. One-way local trunking raises the price of interconnection, inasmuch as it requires the use of trunks to multiple tandems, some of which have *de minimis* local traffic, so that two trunks will have to be barely utilized rather than one. Gemini proposes to use two-way trunking, at least on routes where overall traffic is low (for example, less than 200,000 minutes per month in either direction).

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

## **2. Issue Presented – Trunking to All Tandems**

Gemini should not be required to establish local interconnection trunks to all tandems in the LATA. (Sections 4.2; 4.3; 4.4; 5.3.2.1)

### **Gemini's Position**

SBC's proposal requires Gemini to establish *local* interconnection trunks to all tandems in the LATA. Gemini proposes that it should not be required to interconnect with tandems with which it will not exchange local traffic, inasmuch as its facilities footprint will not initially be statewide. By way of example only, Gemini may not have immediate plans to serve (on a facilities-based basis) areas subtending the New London tandem, so it will be required to establish trunks that will not be utilized for local traffic. To the extent that it carries toll calls into those areas, Gemini will use switched access trunks, which can be two-way, rather than SBC's proposed local trunks.

Other state commissions arbitrating issues such as this have held that “economic entry into the market requires that [CLECs] be permitted to use [their] existing trunks for all traffic whenever feasible.”<sup>84</sup> SBC’s refusal to allow Gemini to utilize two-way trunks is clearly meant to exert additional economic pressure on Gemini by forcing Gemini to use an uneconomic and inefficient network configuration.

### **SBC’s Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini’s mark-up of this Appendix.

### **3. Issue Presented – VoIP vs. Switched Access**

SBC cannot dictate that VoIP traffic be treated as Switched Access. (Section 12.1)

### **Gemini’s Position**

SBC’s proposal is to treat all nonlocal Voice over Internet Protocol (“VoIP”) traffic as Switched Access, including computer-to-phone and phone-to-computer traffic. SBC’s proposal conflicts with the FCC ruling on VOIP traffic, which currently allows such calls to be treated as exempt from access charges.<sup>85</sup> This type of traffic is also the subject of a currently pending rulemaking proceeding at the FCC.<sup>86</sup>

The FCC, various state commissions and legislators, state and federal, have espoused the public policy goal of promoting the growth of the Internet through a deregulatory “hands off”

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<sup>84</sup> In the Matter of the Application of Sprint Communications Company, L.P. for Arbitration to Establish an Interconnection Agreement with Ameritech Michigan, MPSC Case No. U-11203, Order Approving Arbitration Agreement with Modifications, Jan. 15, 1997 at 4-5. See also US West Communications v. MFS Intelenet, Inc., 193 F.3d 1112, 1124-25 (9<sup>th</sup> Cir. 1999). Additionally, costs imposed on CLECs in interconnecting with an ILEC are key considerations in defining the terms and conditions of an Interconnection Agreement. See Re Southwestern Bell Telephone Company, TX PUC Docket No. 22315, Mar. 14, 2001.

<sup>85</sup> See Intercarrier Compensation Notice of Proposed Rulemaking, at ¶ 6 (“long-distance calls handled by ISPs using IP telephony are generally exempt from access charges under the enhanced service provider (ESP) exemption.”)

<sup>86</sup> In the Matter of IP-Enabled Services, Notice of Proposed Rulemaking, WC Docket No. 04-36 (Mar. 10, 2004).

approach. Thus, ILEC's are not permitted to charge access charges to these customers. Gemini thus requests that these provisions be stricken from the Appendix.

#### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **4. Issue Presented – FX Traffic**

SBC must follow relevant Department rulings concerning FX traffic. (Section 12.1(ii))

#### **Gemini's Position**

The Department, citing the FCC's ISP Order,<sup>87</sup> has ruled that intraLATA FX traffic used by access-exempt Internet service providers is exempt from access charges, because of its interstate jurisdiction.<sup>88</sup> Notwithstanding these clear pronouncements, in SBC's proposal, SBC has categorized all FX traffic as switched access, in an attempt to inappropriately recover access charges. Gemini requests that Section 12.1(ii) be stricken from the Appendix.

#### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **5. Issue Presented – Third Parties**

Gemini should not be responsible for the actions of third parties. (Section 12.2)

#### **Gemini's Position**

Gemini does not believe that it should be responsible for removing another carrier's traffic or taking action against another carrier in the event that SBC believes that the third party

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<sup>87</sup> Declaratory Ruling, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Inter-carrier Compensation for ISP-Bound Traffic, 14 FCC Rcd 3689 (1999).

<sup>88</sup> Decision, Docket No. 01-01-29, DPUC Investigation of the Payment of Mutual Compensation for Local Calls Carried Over Foreign Exchange Service Facilities, Jan. 30, 2002.

carrier is inappropriately delivering switched access traffic over local interconnection trunk groups. Gemini will not unilaterally, or in concert with SBC, take action to block another carrier's traffic absent an appropriate court, FCC or Department order.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's markup of this Appendix.

#### **G. Appendix Inter-carrier Compensation (Exhibit 5)**

Gemini was provided with SBC's 13-state boilerplate Inter-carrier Compensation Appendix to mark up. Gemini marked-up the Appendix and returned it to SBC on January 7, 2005. Gemini objected to Sections 16, 17 and 18 of the Appendix. However, after returning its markup to SBC, Gemini discovered that SBC had revised its boilerplate and posted a new version on its website that did not include Sections 16, 17 or 18. Gemini did not remark the new version, but relies on its original markup herein. However, Gemini does not address its arguments for removing Sections 16, 17 and 18 and assumes, based on SBC's new boilerplate version, that SBC agrees to the removal of those sections.

#### **1. Issue Presented – ISP Bound Calls vs. Switched Access**

SBC's proposal concerning Virtual NXX and FX calls made to ISPs is not in compliance with appropriate FCC or Department rulings. (Section 3.3)

### **Gemini's Position**

SBC's proposal treats Virtual NXX and FX calls made to ISPs as switched access, rather than ISP-bound calls. This is in direct conflict with the relevant FCC and Department rulings,

which mandate that such calls are exempt from access charges.<sup>89</sup> The rulings of the FCC and the Department are clear:

Ultimately, however, we conclude that Congress, through section 251(g), expressly limited the reach of section 251(b)(5) to exclude ISP-bound traffic. Accordingly, we affirm our conclusion in the *Declaratory Ruling* that ISP-bound traffic is not subject to the reciprocal compensation obligations of section 251(b)(5).<sup>90</sup>

The FCC made clear that its orders applied to all ISP-bound traffic: “We conclude that this definition of ‘information access’ was meant to include all access traffic that was routed by a LEC ‘to or from’ providers of information services, of which ISPs are a subset.”<sup>91</sup> SBC can provide no legal justification for limiting this federal pronouncement to local ISP-bound traffic.

### **SBC’s Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini’s mark-up of this Appendix.

## **2. Issue Presented – Tandem Compensation**

Gemini is entitled to tandem compensation. (Section 5.4)

### **Gemini’s Position**

SBC states that “CLEC shall only be paid End Office Serving Rate Elements.” Gemini’s service area is larger than that of an SBC tandem, which makes it eligible for tandem compensation under FCC Rule 51.711a(3) which provides:

Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC’s tandem

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<sup>89</sup> See Order on Remand and Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151 (2001) (“ISP Remand Order”); Decision, Docket No. 01-01-29, DPUC Investigation of the Payment of Mutual Compensation for Local Calls Carried Over Foreign Exchange Service Facilities, Jan. 30, 2002.

<sup>90</sup> ISP Remand Order at ¶ 3.

<sup>91</sup> ISP Remand Order at ¶ 44 (emphasis added).

switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

This provision is applicable to the extent that the carrier provides a single Point of Interface serving its coverage area.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

### **3. Issue Presented – Growth caps and New Market Restrictions**

Growth cap and new market restrictions on ISP-bound traffic are obsolete. (Sections 6.3; 6.4; 6.5; 6.5.2)

### **Gemini's Position**

The growth cap and new market restrictions on ISP-bound traffic have been lifted by the FCC, rendering the current SBC-proposed text obsolete.<sup>92</sup>

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

## **H. Appendix Physical Collocation (Exhibit 6)**

SBC provided Gemini with its generic 13-state Appendix Physical Collocation. Gemini blacklined the Appendix, providing SBC with its comments and concerns on November 10, 2004. As of the date of this filing, SBC has not responded to Gemini's comments or concerns or provided Gemini with any comments on Gemini's mark-up.

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<sup>92</sup> See Order, Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order, 19 FCC Rcd 20179, 2004 FCC LEXIS 5873 at ¶¶ 20-21, 24 (rel. Oct. 18, 2004) ("Given



## **1. Issue Presented – Commercial Agreements**

Collocation should apply to elements obtained under commercial agreements. (Sections 1.3; 9.1)

### **Gemini's Position**

Gemini submits that collocation must apply to elements obtained under commercial agreements, and not just to Lawful UNEs, as SBC's boilerplate proposes. While current rules provide a wide range of UNEs that justify collocation, ILECs, including SBC, are attempting to reduce the UNE list, being somewhat successful in having some interoffice facilities now not qualifying as UNEs on some interoffice routes. In order to compensate, some ILECs are entering into commercial agreements as substitutes for UNEs. However, if collocation is only available for UNEs, then collocation that is used to access UNEs may be discontinued if the network elements accessed from the respective collocation become discontinued or accessed through a commercial agreement. Access-tariff collocation is not a suitable substitute because it lacks the cageless option and is far costlier.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's markup of this Appendix.

## **2. Issue Presented – Tariffed Services**

Gemini is entitled to purchase physical collocation from tariff. (Section 1.4)

### **Gemini's Position**

SBC is required to file tariffs to ensure the availability of UNEs and collocation to all requesting carriers upon reasonable, nondiscriminatory rates and terms. Gemini does not know

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the market developments since that time, however, we find that these rules are no longer necessary to ensure that charges and practices are just and reasonable, and not unjustly or unreasonably discriminatory.”).

why SBC is trying to prevent access to collocation through its tariff or otherwise avoid its obligation to provide services through tariff.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

### **3. Issue Presented – Node Housing**

A definition of "Node Housing" may be required. (Sections 2; 8.1)

### **Gemini's Position**

Gemini does not believe that use of the Node Housing constitutes collocation under this Appendix. However, SBC's draft CCF Appendix refers to the Node Housing as a Remote Terminal. In the event that the Department accepts SBC's Little UNE model and determines that the Node Housing is a collocation structure, Gemini requests that a definition for Node Housing be included, as it is a different entity from the other eligible structures or dedicated space defined in this Appendix.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

### **4. Issue Presented – Negligence and Subrogation**

SBC should be responsible for its negligence; Gemini will not waive its right of subrogation. (Sections 5.8.1.1.4; 5.8.1.1.5)

### **Gemini's Position**

Gemini will not release SBC from liability for SBC's own negligence. Gemini believes that each party should be responsible for its own negligence. Further, Gemini will not waive its right of subrogation against SBC.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's markup of this Appendix.

## **5. Issue Presented – ICDF Collocation**

Gemini requests ICDF Collocation be made available. (Section 6.1.1.6)

### **Gemini's Position**

Gemini requests that ICDF Collocation be made available pursuant to this Appendix. Qwest provides Interconnect Distribution Frame ("ICDF") Collocation in its ILEC regions and Gemini's proposed language comes from the Qwest Statement of Generally Available Terms and Conditions ("SGAT"). ICDF Collocation provides access to the Shared Point of Termination ("SPOT") bays, so that the CLEC can make its own connections between ILEC-provided transmission facilities, but it provides no floor space or power. The recurring cost is only for the termination points. This is especially significant to Gemini because there may be cases, especially in the Big UNE model requested by Gemini, where the Fiber Tail ends in the central office, but Gemini needs no other equipment there. Thus, access to the Fiber Tail, and to its own fiber trunks that would also be installed on a Point of Termination Bay, could be most efficiently achieved via ICDF Collocation. Gemini will, for instance, drop its fiber off at Manhole 0 or its equivalent, and patch it to the Fiber Tails at the ICDF. SBC does not offer this as a standard option; however, SBC's own Section 6.1.1.6 may allow for it, as ICDF is a collocation

arrangement deployed by another ILEC. Nevertheless, Gemini requests that its language be specifically added.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **6. Issue Presented – Termination Penalties**

Early termination prior to use does not entitle SBC to recover monthly recurring charges. (Section 6.4.4)

### **Gemini's Position**

In the event that Collocation space is prepared but not utilized, SBC seeks to recover all costs associated with preparing the space, in addition to the monthly recurring charges for the space as if the space was utilized. This is an unconscionable penalty and, as such, is void pursuant to applicable law. Gemini has no objection to including language that, in such an event, Gemini will pay SBC all reasonably incurred costs in preparing the space.

It is . . . well settled that a contract provision which imposes a penalty for breach of contract is invalid, but a provision which allows liquidated damages for breach of contract is enforceable if certain conditions are satisfied. *Norwalk Door Closer Co. v. Eagle Lock & Screw Co.*, 153 Conn. 681, 686, 220 A.2d 263 (1966). The requisite three conditions are that: (1) the damage which was to be expected as a result of a breach of contract was uncertain in amount or difficult to prove; (2) there was an intent on the part of the parties to liquidate damages in advance; and (3) the amount stipulated was reasonable. *Berger v. Shanahan*, 142 Conn. 726, 732, 118 A.2d 311 (1955).<sup>93</sup>

Certainly, in the event of an early breach, SBC's actual damages are easy to calculate. The damages can be calculated as the amount of money spent by SBC to prepare the space. There is

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<sup>93</sup> Hanson Dev. Co. v. East Great Plains Shopping Ctr., 195 Conn. 60, 64-65 (1985) (citations in original).

no further damage as the space is available to SBC to rent to another party, which party will also pay SBC any necessary costs associated with preparing the space for that party's use.

Furthermore, "no provision in a contract for the payment of a fixed sum as damages, whether stipulated for as a penalty or as liquidated damages, will be enforced in a case where the court sees that no damage has been sustained."<sup>94</sup> This principle is irrespective of the parties' intent. "If the parties honestly but mistakenly suppose that a breach will cause harm that will be incapable or very difficult of accurate estimation, when in fact the breach causes no harm at all or none that is incapable of accurate estimation without difficulty, their advance agreement fixing the amount to be paid as damages for the breach . . . is not enforceable."<sup>95</sup> As SBC's damages are easy to calculate, even now prior to contract execution, this penalty clause will clearly be unenforceable. Thus, the clause should be stricken in order to avoid the needless costs associated with litigation in the event that this clause comes into play.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

### **7. Issue Presented - Escrow**

Gemini will not tie up funds in an escrow account during the pendency of a billing dispute. (Sections 6.6.2; 6.6.3; 6.6.4; 6.6.9)

### **Gemini's Position**

Gemini is extremely concerned that inclusion of this provision will allow SBC to tie up substantial funds of a competitor with no appropriate basis. Gemini has engaged in past billing

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<sup>94</sup> Norwalk Door Closer v. Eagle Lock & Screw Co., 153 Conn. 681, 688 (1966) quoting Miller v. Macfarlane, 97 Conn. 299, 302.

<sup>95</sup> Restatement, 1 Contracts § 339, comment (e).

disputes with ILECs and it has taken an inordinate amount of time to get such disputes resolved. According to SBC's proposal, substantial funds of Gemini could be tied up in escrow during the pendency of such a dispute, with no recourse against SBC for dragging its feet to reach resolution.

In order to obtain a CLEC license in the State of Connecticut, Gemini underwent a thorough review by the Department of Gemini's financial suitability to operate in Connecticut. In the event that Gemini is unable or unwilling to live up to its financial obligations, SBC has recourse through the Department. Moreover, SBC is entitled to late payment penalties in the event that a dispute is resolved in its favor. These protections are more than adequate and obviate the need to tie up a CLEC's capital during the pendency of a dispute.

#### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **8. Issue Presented – Limitation of Services**

SBC cannot limit Gemini's use of collocation to the provision of local exchange service. (Sections 9.1.1; 9.1.2; 9.1.4; 9.3)

#### **Gemini's Position**

Consistent with Gemini's positions in the HFC UNE Appendix, the General Terms and Conditions Appendix and other appendices, Gemini submits that SBC cannot restrict Gemini's use of the collocation equipment solely to the provision of local exchange services. Gemini proposes to add the phrase "and other lawful purposes" in several places within these sections to clarify this issue.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **9. Issue Presented – Liability**

Gemini should only be held liable for knowing or willful incompleteness. (Section 9.2.1)

### **Gemini's Position**

Gemini does not believe it is fair to include inadvertent mistakes as violations of the rules and regulations governing this Appendix.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **10. Issue Presented – Eviction**

CLECs should not be evicted from collocated space upon the filing of a bankruptcy petition. (Section 11.1)

### **Gemini's Position**

Evicting a collocator based upon the filing of a bankruptcy petition is a very drastic remedy. CLEC bankruptcies are commonplace. Gemini requests that this language be stricken from the Appendix.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **11. Issue Presented – Reciprocity of Indemnification**

Indemnification language should be reciprocal. (Section 12.2)

### **Gemini's Position**

There is no reason why Gemini should be forced to indemnify SBC without reciprocal indemnification from SBC.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **12. Issue Presented – 21 day Lock Out**

Gemini should not be "locked out" of its collocated space for 21 days. (Section 19.2.8.1)

### **Gemini's Position**

SBC's proposal provides that SBC will issue collocator access identification cards within 21 days of request. SBC's language further provides that the 21-day period will only be expedited for emergencies or extenuating circumstances, but not in the normal course of business. Gemini submits that to be unable to access collocated equipment for a period of 21 days is unacceptable and detrimental to Gemini's business. Gemini requests that SBC be required to make reasonable accommodations to Gemini during the 21 day period.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **13. Issue Presented - Travel**

Gemini will not pay travel time for SBC employees. (Section 19.2.17.1.2)

### **Gemini's Position**

SBC is a state-wide provider of service and the local ILEC for almost all of Connecticut. As such, SBC is required to have service personnel available in all areas of the state. It is



inappropriate to expect Gemini to pay travel expenses and travel time in 15 minute increments for vendor meets or repair technicians, especially when Gemini has no control over from where the SBC personnel are dispatched.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **I. Appendix Virtual Collocation (Exhibit 7)**

SBC provided Gemini with its generic 13-state Appendix Virtual Collocation. Gemini blacklined the Appendix, providing SBC with its comments and concerns on November 10, 2004. As of the date of this filing, SBC has not responded to Gemini's comments or concerns or provided Gemini with any comments on Gemini's mark-up.

##### **1. Issue Presented – Commercial Agreements**

Collocation should apply to elements obtained under commercial agreements. (Sections 1.1)

### **Gemini's Position**

Gemini submits that collocation must apply to elements obtained under commercial agreements, and not just to Lawful UNEs, as SBC's boilerplate proposes. While current rules provide a wide range of UNEs that justify collocation, ILECs, including SBC, are attempting to reduce the UNE list, being somewhat successful in having some interoffice facilities now not qualifying as UNEs on some interoffice routes. In order to compensate, some ILECs are entering into commercial agreements as substitutes for UNEs. However, if collocation is only available for UNEs, then collocation that is used to access UNEs may be discontinued if the network elements accessed from the respective collocation become discontinued or accessed

through a commercial agreement. Access-tariff collocation is not a suitable substitute because it lacks the cageless option and is far costlier.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

## **2. Issue Presented – Tariffed Services**

Gemini is entitled to purchase virtual collocation from tariff. (Section 1.2)

### **Gemini's Position**

SBC is required to file tariffs to ensure the availability of UNEs and collocation to all requesting carriers upon reasonable, nondiscriminatory rates and terms. Gemini does not know why SBC is trying to prevent access to collocation through its tariff or otherwise avoid its obligation to provide services through tariff.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

## **3. Issue Presented – Security Escort**

Gemini should not be required to pay for a security escort to maintain its collocated equipment. (Section 1.3.2; 16.1; 16.2)

### **Gemini's Position**

To the extent that the Department determines that the Node Housing is subject to collocation, which Gemini does not believe it is, Gemini does not believe that it should have to pay for a security escort as no other carrier's equipment will be collocated in the Node Housing.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **4. Issue Presented – Limitation of Services**

SBC cannot limit Gemini's use of collocation to the provision of local exchange service. (Section 1.8; 1.10; 1.12.1; 1.12.2)

### **Gemini's Position**

Consistent with Gemini's positions in the HFC UNE Appendix, the General Terms and Conditions Appendix and other appendices, Gemini submits that SBC cannot restrict Gemini's use of the collocation equipment solely to the provision of local exchange services. Sections 251(c)(2) and 251(c)(3) traffic are not the sole lawful purpose of collocation in the Act. Gemini proposes to add language to clarify that collocation is available for access for all lawful purposes.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **5. Issue Presented – Definition of Technically Feasible**

Technically feasible must take into consideration Connecticut state standards. (Section 2.14)

### **Gemini's Position**

Gemini is negotiating this Appendix for access to SBC's abandoned HFC plant. The abandoned HFC plant is unique in the nation and no other ILEC has HFC plant constructed for the provision of telecommunications services. The Department has dealt extensively with the HFC plant and is aware of the appropriate standards surrounding the technical feasibility of

accessing and collocating for the use of that abandoned HFC plant. Accordingly, Gemini proposes adding a reference to Connecticut state standards in Section 2.14.

#### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **6. Issue Presented – Reciprocity of Indemnification**

Indemnification provisions should be reciprocal. (Section 11; 13.8; 14.1.2)

#### **Gemini's Position**

There is no reason why Gemini should be forced to indemnify SBC without reciprocal indemnification from SBC.

#### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **7. Issue Presented – Power Charges**

Power charges should be based on the fused, rated or measured draw of the collocated equipment. (Section 12.5.3.1)

#### **Gemini's Position**

There is no rationale for charging for power based on space utilized rather than upon the fused, rated or measured draw of the collocated equipment.

#### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

**8. Issue Presented – Security Escort**

Gemini should not have to pay for a security escort. (Section 13.4)

**Gemini's Position**

To the extent that the Department determines that the Node Housing is subject to collocation, which Gemini does not believe it is, Gemini does not believe that it should have to pay for a security escort as no other carrier's equipment will be collocated in the Node Housing.

**SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

**9. Issue Presented – Negligence and Subrogation**

SBC should be responsible for its negligence; Gemini will not waive its right of subrogation. (Section 14.2.4)

**Gemini's Position**

Gemini will not release SBC from liability for SBC's own negligence. Gemini believes that each party should be responsible for its own negligence. Further, Gemini will not waive its right of subrogation against SBC.

**SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

**J. Appendix NIM (Network Interconnection Methods) (Exhibit 8)**

SBC provided Gemini with its generic 13-state Appendix NIM. Gemini blacklined the Appendix, providing SBC with its comments and concerns on December 6, 2004. As of the date

of this filing, SBC has not responded to Gemini's comments or concerns or provided Gemini with any comments on Gemini's mark-up.

**1. Issue Presented – Point of Interconnection**

SBC must allow interconnection at any technically feasible point. (Sections 1.26; 1.28)

**Gemini's Position**

SBC's terms and conditions omit the critical requirement that SBC allow Gemini to interconnect at any technically feasible point, by any technically feasible means. This is a critical issue in the context of Gemini's interconnection of its existing HFC network with the abandoned portions of SBC's HFC network.

**SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

**2. Issue Presented – Local Trunks to all Tandems**

Gemini should not be required to establish local interconnection trunks to all tandems in the LATA. (Section 2.1)

**Gemini's Position**

SBC's proposal requires Gemini to establish *local* interconnection trunks to all tandems in the LATA. Gemini proposes that it should not be required to interconnect with tandems with which it will not exchange local traffic, inasmuch as Gemini's facilities footprint will not initially be statewide. By way of example only, Gemini may not have immediate plans to serve (on a facilities-based basis) areas subtending the New London tandem, so it will be required to establish trunks that will not be utilized for local traffic. To the extent that it carries toll calls

into those areas, Gemini will use switched access trunks, which can be two-way, rather than SBC's proposed local trunks.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

### **3. Issue Presented – SBC's Originating Traffic**

SBC should remain financially responsible for calls originated from the end office in which a CLEC has established collocation. (Section 2.7)

### **Gemini's Position**

SBC's proposed language would unlawfully shift to Gemini SBC's financial responsibility for transporting SBC's originating traffic to Gemini's network. If Gemini establishes collocation, for instance to interconnect its HFC trunk fiber to SBC-provided HFC Fiber Tails, the provision of Direct End Office Trunks for calls made to Gemini from that central office should remain SBC's responsibility, as the sending party, as per 47 CFR 51.703(b):

The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportions may be measured during peak periods.

Thus, SBC may not legally assess charges on any other telecommunications carrier, including Gemini, for local traffic that originates on its own network.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **4. Issue Presented – Entrance Facilities**

SBC should make entrance facilities available without reservation. (Section 5.1)

##### **Gemini's Position**

While entrance facilities used for access to UNEs are themselves no longer UNEs, at a minimum SBC should willingly, and not subject to the proposed reservations, make them available under access tariffs. Furthermore, pending a complete review of the new UNE rules and any subsequent challenges, the status for entrance facilities for interconnection is unclear.

##### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **K. Appendix Coordinated Hot Cut (CHC) (Exhibit 9)**

SBC provided Gemini with its generic 13-state Appendix CHC. Gemini blacklined the Appendix, providing SBC with its comments and concerns on December 6, 2004. As of the date of this filing, SBC has not responded to Gemini's comments or concerns or provided Gemini with any comments on Gemini's mark-up.

#### **1. Issue Presented – DPUC CHC Ruling**

Gemini should be afforded the same treatment as provided to other CLECs by the DPUC's Decision, Docket No. 02-02-02, DPUC Investigation of The Southern New England Telephone Company's Baseline Hot Cut Procedures, where applicable. (Section 2.5)

##### **Gemini's Position**

In February 2002, the Department initiated a docket to investigate the baseline hot cut procedures of SBC. Gemini was not a party to that docket as Gemini had not yet filed its Petition in Docket No. 03-01-02 and had no intention at that time of negotiating an



interconnection agreement with SBC. However, Gemini believes that it should be treated in a nondiscriminatory manner vis a vis other CLECs and should be entitled to the same treatment afforded to other CLECs pursuant to the terms of that docket.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **L. Appendix Numbering (Exhibit 10)**

SBC provided Gemini with its generic 13-state Appendix Numbering. Gemini blacklined the Appendix, providing SBC with its comments and concerns on January 3, 2005. As of the date of this filing, SBC has not responded to Gemini's comments or concerns or provided Gemini with any comments on Gemini's mark-up.

##### **1. Issue Presented- FX Numbers**

Gemini should be allowed to assign FX numbers. (Section 2.3)

### **Gemini's Position**

SBC's proposal forbids Gemini from ever assigning a virtual NXX or FX number, even if the subscriber is just across the exchange boundary and within the local calling area, or wants the FX number to expand its incoming range for any purpose at all, ISP-exempt or switched access. Gemini objects to this prohibition. Gemini recognizes that the rules of number portability are that a ported number's rate center assignment goes with its NPA-NXX, not its subscriber's location, and Gemini separately recognizes that under current rules, non-ISP FX calls can be treated as switched access. Nevertheless, Gemini reserves the right to assign virtual NXX and FX numbers.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **M. Appendix for Access to SBC Communication Inc.'s Structure (Poles, Conduits and Rights of Way) (Exhibit 11)**

SBC provided Gemini with its generic 13-state Structure Appendix. Gemini blacklined the Appendix, providing SBC with its comments and concerns on November 11, 2004. As of the date of this filing, SBC has not responded to Gemini's comments or concerns or provided Gemini with any comments on Gemini's mark-up.

#### **1. Issue Presented – Inclusion of HFC**

SBC's definition of Rights of Way should include the rights SBC has for its HFC network.

### **Gemini's Position**

Gemini believes that SBC has no basis to exclude rights-of-way associated with the HFC network, as such are critical to Gemini's access to the abandoned portions of the HFC network.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **2. Issue Presented – Elective Termination**

SBC should not be permitted to terminate this Appendix during the term of the Interconnection Agreement. (Section 4.4; 4.5)

### **Gemini's Position**

SBC should not be permitted to unilaterally terminate this Appendix during the term of the Interconnection Agreement, absent good cause. The practical effect of termination of this

Appendix would be to terminate Gemini's right of access to the abandoned HFC network and the necessary attachments for Gemini's own network.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

### **3. Issue Presented – Refund of Advance Payments**

In the event that the Structure Appendix is terminated, SBC must refund all advance payments. (Section 4.6)

### **Gemini's Position**

In the event of early termination of the Structure Appendix, SBC cannot withhold refunds of advance payments. To do otherwise would amount to an illegal penalty.

It is . . . well settled that a contract provision which imposes a penalty for breach of contract is invalid, but a provision which allows liquidated damages for breach of contract is enforceable if certain conditions are satisfied. *Norwalk Door Closer Co. v. Eagle Lock & Screw Co.*, 153 Conn. 681, 686, 220 A.2d 263 (1966). The requisite three conditions are that: (1) the damage which was to be expected as a result of a breach of contract was uncertain in amount or difficult to prove; (2) there was an intent on the part of the parties to liquidate damages in advance; and (3) the amount stipulated was reasonable. *Berger v. Shanahan*, 142 Conn. 726, 732, 118 A.2d 311 (1955).<sup>96</sup>

Certainly, in the event of early termination by SBC, the damages will be suffered by Gemini.

“[N]o provision in a contract for the payment of a fixed sum as damages, whether stipulated for as a penalty or as liquidated damages, will be enforced in a case where the court sees that no damage has been sustained.”<sup>97</sup> This principle is irrespective of the parties' intent. “If the parties honestly but mistakenly suppose that a breach will cause harm that will be incapable or very

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<sup>96</sup> *Hanson Dev. Co. v. East Great Plains Shopping Ctr*, 195 Conn. 60, 64-65 (1985).

<sup>97</sup> *Norwalk Door Closer Co. v. Eagle Lock & Screw Co.*, 153 Conn. 681, 688 (1966) quoting *Miller v. Macfarlane*, 97 Conn. 299, 302.

difficult of accurate estimation, when in fact the breach causes no harm at all or none that is incapable of accurate estimation without difficulty, their advance agreement fixing the amount to be paid as damages for the breach . . . is not enforceable.”<sup>98</sup> As SBC will suffer no damages, this penalty clause will clearly be unenforceable. Thus, the clause should be stricken in order to avoid the needless costs associated with litigation in the event that this clause comes into play.

#### **SBC’s Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini’s mark-up of this Appendix.

#### **4. Issue Presented – Prior Agreements**

Gemini’s existing pole attachment agreement should remain effective. (Section 5.6 )

#### **Gemini’s Position**

After becoming licensed as a CLEC in Connecticut, Gemini negotiated a pole attachment agreement with SBC to attach Gemini’s own facilities to certain poles in the State of Connecticut. The negotiation process for that attachment agreement was long and painful and resulted in several disputes that took quite a bit of time to resolve. Gemini does not believe that this Appendix should supplant that agreement, especially since SBC has not even proposed rates for this Structure Appendix.

Furthermore, Gemini does not believe that this Structure Appendix should be applicable to those portions of the HFC network that Gemini leases from SBC pursuant to the terms of this Interconnection Agreement. Gemini believes that attachment rights are part of the UNE it is seeking and SBC should not be separately compensated.

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<sup>98</sup> Restatement, 1 Contracts § 339, comment (e).

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **5. Issue Presented – Warranties**

SBC should warrant upon releasing pole licenses that all make-ready work has been completed. (Section 6.1)

### **Gemini's Position**

Gemini is aware of instances where ILECs have released pole licenses despite the fact that the make-ready work paid for by the CLEC had not been completed. Gemini believes that the release of a pole license by SBC should come with an implied warranty that all make-ready has been completed and the pole is ready for Gemini's attachments.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **6. Issue Presented – Taxes**

Gemini will not indemnify SBC against income taxes for pole attachment revenues. (Section 8.9.1)

### **Gemini's Position**

While Gemini does not object to indemnifying SBC for claims arising out of Gemini's pole attachments, Gemini will not indemnify SBC against claims for taxes on income or revenue arising out of Gemini's attachments.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **7. Issue Presented – Contractors' Insurance**

Gemini should be able to require contractors to maintain their own insurance. (Sections 10.1; 10.2)

### **Gemini's Position**

Rather than have Gemini maintain insurance that covers its contractors and subcontractors, Gemini proposes that it be allowed to require contractors and subcontractors to maintain their own insurance in the amounts specified.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **8. Issue Presented – Access to Outside Plant Records**

SBC personnel should not have unfettered access to Gemini's plant records. (Section 14.3.1; 14.6; 21.2)

### **Gemini's Position**

SBC seeks to be able to utilize Gemini's confidential plant records for purposes of "posting information, as necessary, to SBC's outside plant records." While Gemini does not dispute the necessity of maintaining accurate outside plant records, Gemini believes that access to outside plant records should be restricted to SBC employees who have a need to know such information for purposes of public safety or plant maintenance. Gemini does not believe that

SBC employees with strategic or marketing responsibilities should have access to Gemini's plant records, which records Gemini has steadfastly protected from public disclosure.

#### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **9. Issue Presented – Compensation for SBC Oversight and Inspections**

Gemini should not be required to compensate SBC for SBC oversight personnel when Gemini enters an SBC conduit or for post-construction inspections. (Section 16.3.2; 26.1)

#### **Gemini's Position**

Gemini believes that if SBC wants to dispatch personnel to oversee Gemini personnel when Gemini enters conduit space, SBC should do so at its own expense. Otherwise, SBC has the ability to drastically increase costs to Gemini for no cause. Raising the costs to Gemini can make it uneconomic for Gemini to provide service, or, at a minimum raise the costs to Gemini's customers.

Furthermore, Gemini does not believe that it should compensate SBC separately for post-construction inspections. Post-construction inspections are an expense of doing business as the pole custodian and are compensated for in the pole attachment rates.

#### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

**10. Issue Presented – Expunging Confidential Information**

SBC should not have the right to expunge information from its plant records that it unilaterally determines is confidential. (Section 17.5)

**Gemini's Position**

SBC's proposal provides that it may unilaterally determine that certain information in its plant records is confidential and expunge such information without notice to any party or an opportunity for Gemini to be heard. Gemini believes that this is unnecessary and provides SBC with an unfair competitive advantage, in that SBC is the only party who will know where plant is located. Gemini requests notice of, and the opportunity to contest the designation of any plant records as confidential.

**SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

**11. Issue Presented – Existing Nonconformance and Rearrangement**

Gemini should not be required to pay the costs associated with fixing existing nonconformances or rearranging its facilities for new atatchers. (Section 20.5)

**Gemini's Position**

It is a matter of public record that many of the poles in Connecticut contain existing nonconformances and may be in violation of the National Electric Safety Code.<sup>99</sup> Gemini should not be required to pay make-ready costs associated with fixing existing nonconformances that are discovered as a result of Gemini's pole attachment application.

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<sup>99</sup> Decision, Docket No. 99-03-25, Application of the Southern New England Telephone Company for a Declaratory Ruling Regarding Municipal Use of Poles and Conduits, Jan. 19, 2000.



Additionally, Gemini should not bear the costs associated with rearranging its facilities for the benefit of an additional attacher. Rather, the new attacher should pay the make-ready costs, including Gemini's costs of moving.

#### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **12. Issue Presented – Payment for Existing Capacity**

Gemini should not be required to "buy in" to an existing pole. (Section 20.7)

#### **Gemini's Position**

SBC proposes that Gemini buy into a pole installed after 1996 to reimburse SBC for a share of the pole replacement costs. Gemini believes that this most likely amounts to double recovery by SBC. In the event that a party requests space on a pole and SBC must replace the pole, SBC charges the requesting party for the pole replacement as part of the make-ready fee. If SBC is then allowed to charge Gemini a pro rata fee for that prior pole replacement, SBC is double recovering its costs. This assumption is proven by the fact that there is no provision in this Appendix for a refund of make-ready costs in the event of pro rata payments by future attachers.

#### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **13. Issue Presented – Notice**

SBC should provide Gemini with notice prior to removing any attachments. (Section 27.2)

### **Gemini's Position**

SBC should provide Gemini with notice prior to removing any attachments in order to provide Gemini with an opportunity to contest SBC's assertion that such attachments do not have occupancy permits or are not otherwise lawfully present on the poles.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **14. Issue Presented – Removal Time Period**

More than 60 days may be required to remove facilities. (Section 28.3)

### **Gemini's Position**

SBC has proposed that all facilities be removed from poles within 60 days after termination of an occupancy permit. Gemini suggests that 60 days may not be enough time under certain circumstances and that it is more appropriate to base the time frame on the number of pole attachments that must be removed.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **15. Issue Presented – Changes in Rates**

SBC should not have the ability to unilaterally change rates during the term of the Interconnection Agreement. (Section 29.2)

### **Gemini's Position**

Gemini does not believe that SBC should have the unilateral right to change its rates, charges or fees for pole attachments during the term of the Interconnection Agreement. The

appropriate time to change rates, fees and charges is upon expiration of the Agreement and renegotiation of new terms.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **N. Appendix Pricing (Exhibit 12)**

SBC provided Gemini with its generic 13-state Appendix Pricing. Gemini blacklined the Appendix, providing SBC with its comments and concerns on January 7, 2005. As of the date of this filing, SBC has not responded to Gemini's comments or concerns or provided Gemini with any comments on Gemini's mark-up. Additionally, there was not much in SBC's proposal for Gemini to mark up, as the draft Appendix provided by SBC did not contain any proposed pricing for either the HFC UNE or any of the more standard elements.

#### **1. Issue Presented – Pick and Choose**

As pick and choose has been eliminated by the FCC, the pick and choose language is inappropriate. (Section 1.7)

### **Gemini's Position**

The FCC has eliminated the pick and choose rule that previously allowed CLECs to opt into parts of other interconnection agreements.<sup>100</sup> Accordingly, Section 1.7 should be stricken from the Appendix.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

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<sup>100</sup> Second Report and Order, CC Docket No. 01-338, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 19 FCC Rcd 13494 (July 8, 2004).

## **2. Issue Presented – BFR**

Gemini can not be required to seek products or services through the bona fide request (“BFR”) process. (Section 1.9)

### **Gemini’s Position**

SBC is obligated to provide products and services in accordance with applicable law. Gemini will not waive its rights to seek products and services from SBC in manners other than through SBC’s onerous BFR process. SBC has no legal justification for this burdensome requirement.

### **SBC’s Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini’s mark-up of this Appendix.

#### **O. Appendix 911 (Exhibit 13)**

SBC provided Gemini with its generic 13-state Appendix Pricing. Gemini blacklined the Appendix, providing SBC with its comments and concerns on December 27, 2004. As of the date of this filing, SBC has not responded to Gemini’s comments or concerns or provided Gemini with any comments on Gemini’s mark-up.

## **1. Issue Presented – 911 Traffic**

Gemini does not need to transport 911 calls from each point of interconnection. (Section 4.1.1)

### **Gemini's Position**

SBC's proposal requires Gemini to carry 911 traffic separately from each point of interconnection to the appropriate place. Gemini objects to this requirement inasmuch as it is Gemini that needs to receive 911 calls, whether by its own means, or by leasing special access from SBC to the appropriate public safety access point. Gemini may need many points of interconnection to meet SBC's trunking requirements, but this is irrelevant to 911 concerns. The 911 traffic will come from Gemini's switch location and does not necessarily even touch the point of interconnections that Gemini must offer SBC for sending Gemini calls, or that SBC offers Gemini for sending SBC traffic. In theory, 911 traffic might never touch SBC at all, except to the extent that it is Connecticut's 911 contractor.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **P. Appendix OSS – Resale and Lawful UNEs (Exhibit 14)**

SBC provided Gemini with its generic 13-state Appendix OSS – Resale and Lawful UNEs. Gemini blacklined the Appendix, providing SBC with its comments and concerns on December 27, 2004. As of the date of this filing, SBC has not responded to Gemini's comments or concerns or provided Gemini with any comments on Gemini's mark-up.

#### **1. Issue Presented – Definition of Lawful**

The definition of "lawful" should include Connecticut law and lawful and effective rules and orders of the Department. (Section 2.1)

### **Gemini's Position**

As Gemini has argued throughout the underlying administrative proceedings that led to this negotiation and arbitration, the Department has independent state law authority governing unbundling and interconnection.<sup>101</sup> In fact, the uniqueness of the HFC network and the Department's decisions highlight the necessity of a reference to state law and Department orders, rather than just federal law.

Gemini views SBC's characterization of "lawful" UNEs as an attempt to hamstring Gemini into waiving certain of its rights to access to UNEs under state and federal law. Gemini further believes that SBC's definition of lawful is incomplete as it completely ignores state law and the Department's orders. As an alternative to amending the definition of "lawful" as proposed by Gemini, the Department may consider striking the term altogether from all Appendices. The term is not a term defined by federal or state law, or any FCC or Department order. Elimination of the word "lawful" may obviate the need for future litigation.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

#### **2. Issue Presented - Declassification**

SBC's declassification language is unnecessary. (Section 2.1.2; 2.1.4; 2.5.1; 2.5.2)

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<sup>101</sup> The Department recognized its own independent state law authority to unbundle in its Decision, Docket No. 03-01-02, Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding the Unbundled Network Elements of the Southern New England Telephone Company, Dec. 17, 2003.

### **Gemini's Position**

Since the HFC network is unique in the nation, it does not fall neatly into one of the categories of UNEs specifically addressed in Section 251(c)(3) of the Act or the FCC's UNE rules. The Department adequately analyzed this issue in its final decision in Docket No. 03-01-02. Thus, Gemini does not believe it is appropriate to include standard declassification language tied to Section 251(c)(1) and the ongoing legal challenges associated with the FCC's UNE rules. During the course of negotiations, SBC agreed to remove declassification language from the Draft HFC Appendix. However, SBC did not respond to any of Gemini's comments or concerns as of the date of filing of this Petition with respect to this Appendix.

SBC's proposed declassification language, if allowed, would permit SBC to refuse to provide Gemini with necessary UNEs based on SBC's own self-serving, unilateral interpretation of federal law. Gemini requests that the Department reject this attempt by SBC to determine for itself how a change of law operates, especially since SBC's actions concerning the HFC UNEs indicate it already considers the HFC UNEs to be "declassified."

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

### **3. Issue Presented – Commingling**

SBC's prohibition on commingling is not consistent with the FCC's orders. (Section 2.3)

### **Gemini's Position**

In the *Triennial Review Order*, the FCC eliminated the commingling restriction and "affirmatively permit[ted] requesting carriers to commingle UNEs and combinations of UNEs

with services. . . and to require incumbent LECs to perform the necessary functions to effectuate such commingling upon request.”<sup>102</sup> This determination survived the D.C. Circuit’s remand.<sup>103</sup>

### **SBC’s Position**

SBC wants to prohibit Gemini from commingling.

#### **4. Issue Presented – OSS**

Electronic OSS are not necessary. (Sections 3.1; 4.5.1; 5.4)

### **Gemini’s Position**

As argued during Docket No. 03-01-02, Gemini believes that an expensive electronic OSS is unnecessary for ordering, provisioning and billing for the HFC UNEs. Gemini envisions ordering the UNEs on a wire center basis, with billing to be based on a per-foot charge with credits for missing components. Thus, ordering, provisioning and billing can easily be accomplished via a simple spreadsheet.

Traditional copper-based telephony architecture requires an OSS as orders are placed for separate twisted pairs. Each twisted pair ordered may provide a variety of different services, including POTS, vertical features, or data services. Moreover, it is generally SBC that performs the installations, disconnections and maintenance at the customer premises with respect to traditional leased access arrangements. It is thus understandable that a sophisticated OSS is necessary to track and bill for such multiple and diverse functions.

No such OSS is needed for the lease of the HFC UNEs. Gemini seeks to lease the bandwidth of the HFC network. SBC will have no responsibility for the provisioning of service to customers. Gemini has its own work force to perform installations, disconnections and

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<sup>102</sup> TRO at ¶ 579.

<sup>103</sup> Gemini has not had an opportunity to review the new UNE rules released on February 4, 2005 concerning this issue.



maintenance. Gemini will handle ordering, provisioning and servicing of its customers. In addition, Gemini will not be ordering thousands of twisted pairs, but rather bandwidth on one network on a per-mile basis. Bills could be rendered manually by SBC to Gemini in a relatively simple format for little cost.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix. SBC also did not propose any specific OSS for ordering of the HFC UNEs.

### **5. Issue Presented – Maintenance and Repair**

What entities may perform maintenance and repair of the HFC facilities? (Section 6.1)

### **Gemini's Position**

The Department's decision in the reopened docket states:

Therefore, the Department will require the Telco and Gemini to negotiate, as part of their interconnection agreement, the applicable rates and charges that Gemini would incur when Company or Telco approved technicians repair, upgrade and maintain the HFC facilities that are located in the communications gain in the public rights of way.<sup>104</sup> In the opinion of the Department, contracts of this nature are consistent with the FRO and Verizon and should address those issues raised by the Telco relative to negative network reliability.<sup>105</sup>

SBC's position is that the Department's ruling means that only SBC personnel may perform maintenance on the HFC facilities. Gemini believes that this an unnecessarily restrictive interpretation of the Department's ruling. The Department's ruling clearly left open the possibility that qualified contractors or subcontractors approved by SBC could perform the necessary maintenance work. This is a critical issue in light of the fact that SBC currently has no

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<sup>104</sup> In so doing, the Department believes that Telco network reliability and security should be preserved. See Verizon Communications, Inc. v. FCC, 535 U.S. 467, 536 (2002); FRO, ¶203

<sup>105</sup> Decision, Docket No. 03-01-02RE01, Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Concerning the Unbundled Network Elements of the Southern New England Telephone Company, Aug. 25, 2004 at 4. (emphasis added) (footnote in original).

trained or qualified personnel and has not made any attempt to train or otherwise hire personnel to perform maintenance work.

Throughout the underlying administrative proceedings concerning the HFC network, as well as the Superior Court and FCC appeals, SBC has repeatedly stated that it has no personnel trained or qualified to maintain the HFC UNEs.<sup>106</sup> SBC also admittedly used contractors predominantly to perform maintenance on the HFC facilities and to remove customer drops and “dead plant” after announcing its intention to discontinue its use of the HFC Network.<sup>107</sup>

SBC is in no position to maintain or repair the HFC network, especially since SBC has no incentive to adequately maintain, repair or upgrade the HFC facilities. SBC has not repaired or maintained the remaining coaxial portions of the HFC plant since its abandonment. SBC does not intend to utilize the HFC plant. Indeed, SBC has every incentive to delay and inadequately maintain the HFC facilities. Any agreement that permits only SBC personnel, and not qualified contractors, to work on the HFC facilities invites further delay while SBC attempts to hire and train personnel and foreshadows numerous additional regulatory proceedings wherein Gemini will have to seek Department orders to force SBC to provide adequate maintenance and repair.

The Department has encountered the issue of maintenance and repair of utility facilities on at least one prior occasion. In Docket No. 00-03-08, DPUC Review of The Connecticut Light and Power Company’s Customer Service Policies and Charges, CL&P asserted that “the integrity of its distribution system would be compromised if it allows towns to install, connect, disconnect or otherwise maintain streetlights.”<sup>108</sup> The Department rejected CL&P’s contention.

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<sup>106</sup> See, e.g., Docket No. 03-01-02, Reply Comments of The Southern New England Telephone Company, Sept. 26, 2003 at 28 (“the Telco no longer has technicians trained to work on the coaxial facilities and has sold the equipment necessary for such testing, maintenance and repair.”).

<sup>107</sup> See, e.g., Docket No. 03-01-02RE01, Tr. 6/14/04 at 268, 299-301.

<sup>108</sup> Decision, Docket No. 00-03-08, DPUC Review of The Connecticut Light and Power Company’s Customer Service Policies and Charges, July 11, 2001 at 9.

The safety of the personnel that work on CL&P's distribution system is of utmost concern to the Department. Further, the integrity of CL&P's infrastructure must be maintained to assure system reliability. However, there are non-CL&P personnel that have met CL&P's qualifications for working on the system and are maintaining the distribution system at this time. With the exception of the physical connection to the secondary conductor, it does not appear that the type of work that is involved in the installation, removal and maintenance of streetlights would compromise CL&P's system. Therefore, qualified non-CL&P personnel can perform these tasks. Any contractor employed by the town to do this work would be required to obtain all necessary training, certification and to be properly insured before it could perform streetlight maintenance. In addition, the contractor would be required to demonstrate to CL&P's satisfaction that an individual is qualified to do this work. Therefore, the Department rejects CL&P's proposal that only Company personnel can perform streetlight maintenance work with the exception of connecting to the secondary conductor.<sup>109</sup>

Gemini has requested exactly what the Department ordered in the streetlight proceeding. There is also less concern with the reliability of SBC's presently abandoned HFC facilities than CL&P's distribution system. Only 20% of SBC's existing HFC plant comes into contact with any portion of the plant that SBC is still using. The Department has reached similar conclusions allowing the use of qualified contractors for maintenance and repair work within the existing gains of other utility companies.<sup>110</sup>

### **SBC's Position**

SBC maintains that only its technicians may perform maintenance and repair work on the facilities, despite the Department's ruling and the fact that SBC itself predominantly used contractors to construct and deactivate the HFC network.

#### **Q.                   Appendix DA (Directory Assistance Service); Appendix INW (Inward Operator Services); Appendix OS (Operator Services) (Exhibit 15)**

Gemini has agreed to the majority of provisions proposed by SBC in these Appendices. There is only one provision to be resolved by the Department in each of these Appendices. As

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<sup>109</sup> Id.

the issue to be resolved by the Department is identical in each of these Appendices, Gemini has grouped them together for ease of resolution. Gemini provided its mark-up of these Appendices to SBC on January 26, 2005.

**1. Issue Presented**

Must Gemini pay penalties based on estimated monthly charges for early termination of these Appendices?

**Gemini's Position**

Each of these Appendices contains a provision for early termination penalties. Gemini does not believe that it should be required to pay termination penalties for early termination of these Appendices. Gemini is willing to pay for all services rendered by SBC. However, Gemini does not believe it is appropriate to pay estimated charges where SBC can show no actual damages. Such a provision does not serve to operate as liquidated damages, but rather is clearly a penalty and therefore would not likely survive judicial scrutiny.

It is . . . well settled that a contract provision which imposes a penalty for breach of contract is invalid, but a provision which allows liquidated damages for breach of contract is enforceable if certain conditions are satisfied. *Norwalk Door Closer Co. v. Eagle Lock & Screw Co.*, 153 Conn. 681, 686, 220 A.2d 263 (1966). The requisite three conditions are that: (1) the damage which was to be expected as a result of a breach of contract was uncertain in amount or difficult to prove; (2) there was an intent on the part of the parties to liquidate damages in advance; and (3) the amount stipulated was reasonable. *Berger v. Shanahan*, 142 Conn. 726, 732, 118 A.2d 311 (1955).<sup>111</sup>

Certainly, in the event of an early breach, SBC's actual damages are easy to calculate.

Furthermore, "no provision in a contract for the payment of a fixed sum as damages, whether stipulated for as a penalty or as liquidated damages, will be enforced in a case where the

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<sup>110</sup> See Decision, Docket No. 00-03-12, Application of the City of Groton for a Certificate of Public Convenience and Necessity, Apr. 11, 2001 at 4.

<sup>111</sup> Hanson Dev. Co. v. East Great Plains Shopping Ctr., 195 Conn. 60, 64-65 (1985).

court sees that no damage has been sustained.”<sup>112</sup> This principle is irrespective of the parties’ intent. “If the parties honestly but mistakenly suppose that a breach will cause harm that will be incapable or very difficult of accurate estimation, when in fact the breach causes no harm at all or none that is incapable of accurate estimation without difficulty, their advance agreement fixing the amount to be paid as damages for the breach . . . is not enforceable.”<sup>113</sup> As SBC’s damages are easy to calculate, even now prior to contract execution, this penalty clause will clearly be unenforceable. Thus, the clause should be stricken in order to avoid the needless costs associated with litigation in the event that this clause comes into play.

#### **R. Appendix Lawful UNEs (Exhibit 16)**

Gemini had originally reviewed and marked-up this Appendix, returning it SBC. In its original markup, attached hereto as Exhibit 16, Gemini objected to almost all of the Appendix. After further review, Gemini has determined that it objects to the entire Appendix and believes that it adds nothing to the Interconnection Agreement.

#### **Gemini’s Position**

SBC’s Appendix Lawful UNEs provides no technical, managerial or financial terms for interconnection between the parties. Rather, SBC’s Appendix Lawful UNEs amounts to nothing more than SBC’s recitation of its interpretation of the law, much of which is incorrect. Gemini will not be forced to waive its rights under state and federal law by executing this Appendix, especially since the FCC issued new UNE rules on February 4, 2005, which are not accounted for in SBC’s Appendix Lawful UNEs.

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<sup>112</sup> Norwalk Door Closer Co. v. Eagle Lock & Screw Co., 153 Conn. 681, 688 (1966) quoting Miller v. Macfarlane, 97 Conn. 299, 302.

<sup>113</sup> Restatement, 1 Contracts § 339, comment (e).

Gemini does not agree that any of the documents referenced by SBC in this Appendix stands for the propositions that SBC claims they stand for. Accordingly, Gemini cannot agree to the terms based upon SBC's interpretations of these documents and Gemini requests that the Department strike this entire Appendix Lawful UNEs.

### **SBC's Position**

SBC did not provide Gemini with comments on, or otherwise respond to Gemini's mark-up of this Appendix.

### **CONCLUSION**

For the foregoing reasons, Gemini respectfully requests that the Department arbitrate the outstanding issues contained herein between Gemini and SBC and approve the language and positions advocated by Gemini as outlined above.

Respectfully submitted,

GEMINI NETWORKS CT, INC.

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Jennifer D. Janelle  
Shipman & Goodwin LLP  
One Constitution Plaza  
Hartford, Connecticut 06103-1919  
Telephone: (860) 251-5912  
Facsimile: (860) 251-5211  
[jjanelle@goodwin.com](mailto:jjanelle@goodwin.com)

Its Attorneys

<b>EXHIBIT No.</b>	<b>BRIEF DESCRIPTION</b>
<b>A</b>	<b>Email correspondence regarding mark-up of Appendices</b>
<b>B</b>	<b>Email correspondence regarding negotiation start date</b>
<b>C</b>	<b>February 18, 2003 filing in Docket No. 03-01-02</b>
<b>D</b>	<b>Stipulation</b>
<b>1</b>	<b>BIG UNE Specific Issues</b>
<b>2</b>	<b>Little UNE Issues</b>
<b>3</b>	<b>General Terms and Conditions</b>
<b>4</b>	<b>Appendix ITR (Interconnection Trunking Requirements</b>
<b>5</b>	<b>Appendix Intercarrier Compensation</b>
<b>6</b>	<b>Appendix Physical Collocation</b>
<b>7</b>	<b>Appendix Virtual Collocation</b>
<b>8</b>	<b>Appendix NIM (Network Interconnection Methods)</b>
<b>9</b>	<b>Appendix Coordinated Hot Cut (CHC)</b>
<b>10</b>	<b>Appendix Numbering</b>
<b>11</b>	<b>Appendix for Access to SBC Communication Inc.'s Structure (Poles, Conduits and Rights of Way)</b>
<b>12</b>	<b>Appendix Pricing</b>
<b>13</b>	<b>Appendix 911</b>
<b>14</b>	<b>Appendix OSS – Resale and Lawful UNEs</b>
<b>15</b>	<b>Appendix DA (Directory Assistance Service); Appendix INW (Inward Operator Services); Appendix OS (Operator Services)</b>
<b>16</b>	<b>Appendix Lawful UNEs</b>